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MARRIED WOMEN'S
PROPERTY ACTS

Fourth Edition

BY

W. GREGORY WALKER

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THE MARRIED WOMEN'S PROPERTY ACT, 1870,

AND

**THE MARRIED WOMEN'S PROPERTY ACT (1870)
AMENDMENT ACT, 1874.**

L. Eng. C28e

Prop. 436

THE
MARRIED WOMEN'S PROPERTY ACTS:

THEIR RELATIONS TO THE
DOCTRINE OF SEPARATE USE.

With Appendix of Statutes and Forms.

BY THE LATE
J. R. GRIFFITH, B.A., Oxon,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

FOURTH EDITION.

By W. GREGORY WALKER,
OF LINCOLN'S INN, BARRISTER-AT-LAW; B.A., AND LATE SCHOLAR OF EXETER COLLEGE, OXFORD;
AUTHOR OF "THE PARTITION ACTS, 1868 AND 1876; A MANUAL OF THE LAW OF
PARTITION AND OF SALE IN LIEU OF PARTITION."



LONDON:
STEVENS AND HAYNES,
Late Publishers,
BELL YARD, TEMPLE BAR.
1878.

LONDON :
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHURCH LANE.

PREFACE TO THE FOURTH EDITION.

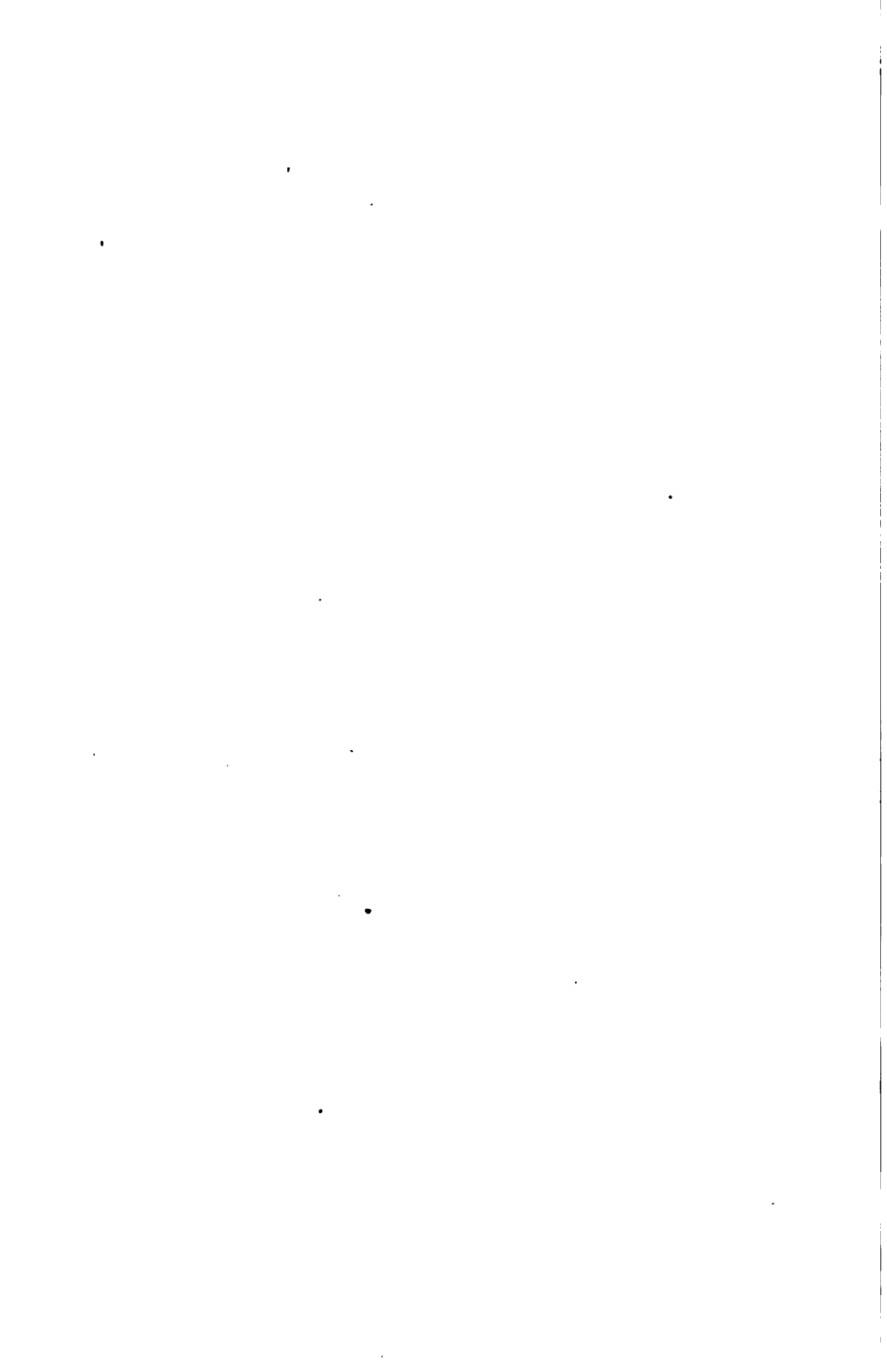
IN consequence of the premature death of the learned Author of this book, I have undertaken, at the Publishers' request, to edit a Fourth Edition.

The reader will find that the authorities on the Acts have been brought down to the latest date, and that in many places fresh matter has been introduced, while in some instances old matter has been re-arranged. The index has been considerably extended.

That this Edition is no larger than the last is attributable to the excision of the Reports which formerly appeared at length in the Appendix. I thought they might without inconvenience be omitted, being easily accessible elsewhere.

W. GREGORY WALKER.

22, Old Buildings, Lincoln's Inn,
January 1878.



PREFACE TO THE THIRD EDITION.

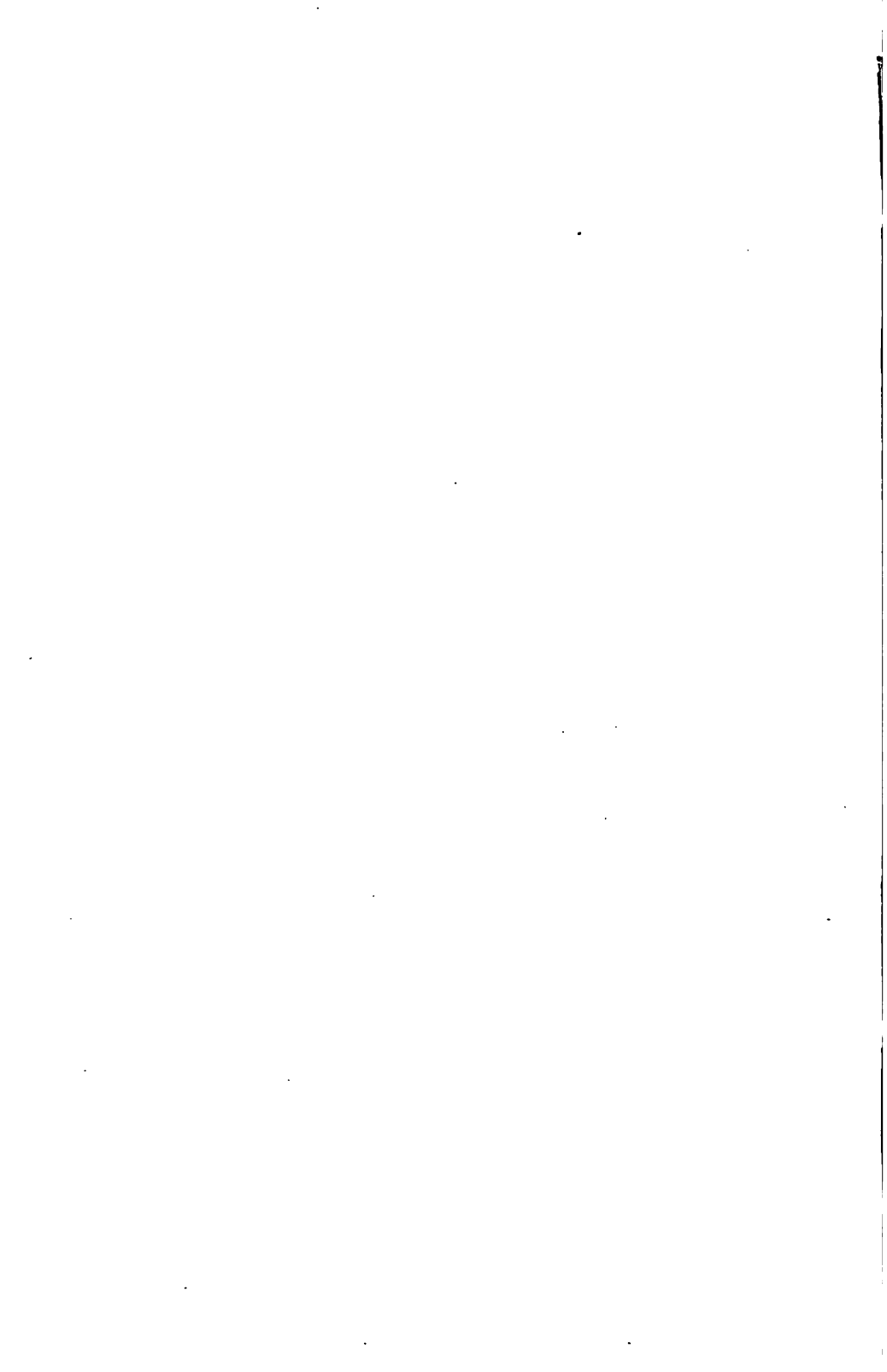


SINCE the appearance of the Second Edition, the defects of the 12th Section of the Act of 1870 have been remedied by an Amendment Act, passed in the last Session; other and more extensive measures of reform having failed to obtain the sanction of the Legislature in the previous year.

The law of husband and wife cannot as yet be treated as in other than a state of transition. Well-recognized rules have, in deference to the needs of an altered state of society, been broken in upon or abolished; but it is difficult to trace any comprehensive or intelligible principle in the reforms hitherto introduced.

* * * * *

2A, Old Square, Lincoln's Inn,
December 1874.



PREFACE TO THE FIRST EDITION.

THE object of the "Married Women's Property Act, 1870," as defined in the Preamble, is, "To Amend the Law of Property and Contract with respect to Married Women." Under the Act, the rights which women have hitherto enjoyed in Equity in respect of separate estate, are apparently recognised and adopted; while a most beneficial, if somewhat anomalous, position is given to them at Law. It has been attempted in the following Notes to give a summary of the cases, decided in Courts of Equity, on the rights and liabilities of married women in relation to their separate estate; and to suggest some changes, which may probably arise in the practice of the Courts, from the new status given to them by the Act.

24, *Old Square, Lincoln's Inn*,
January 1871.

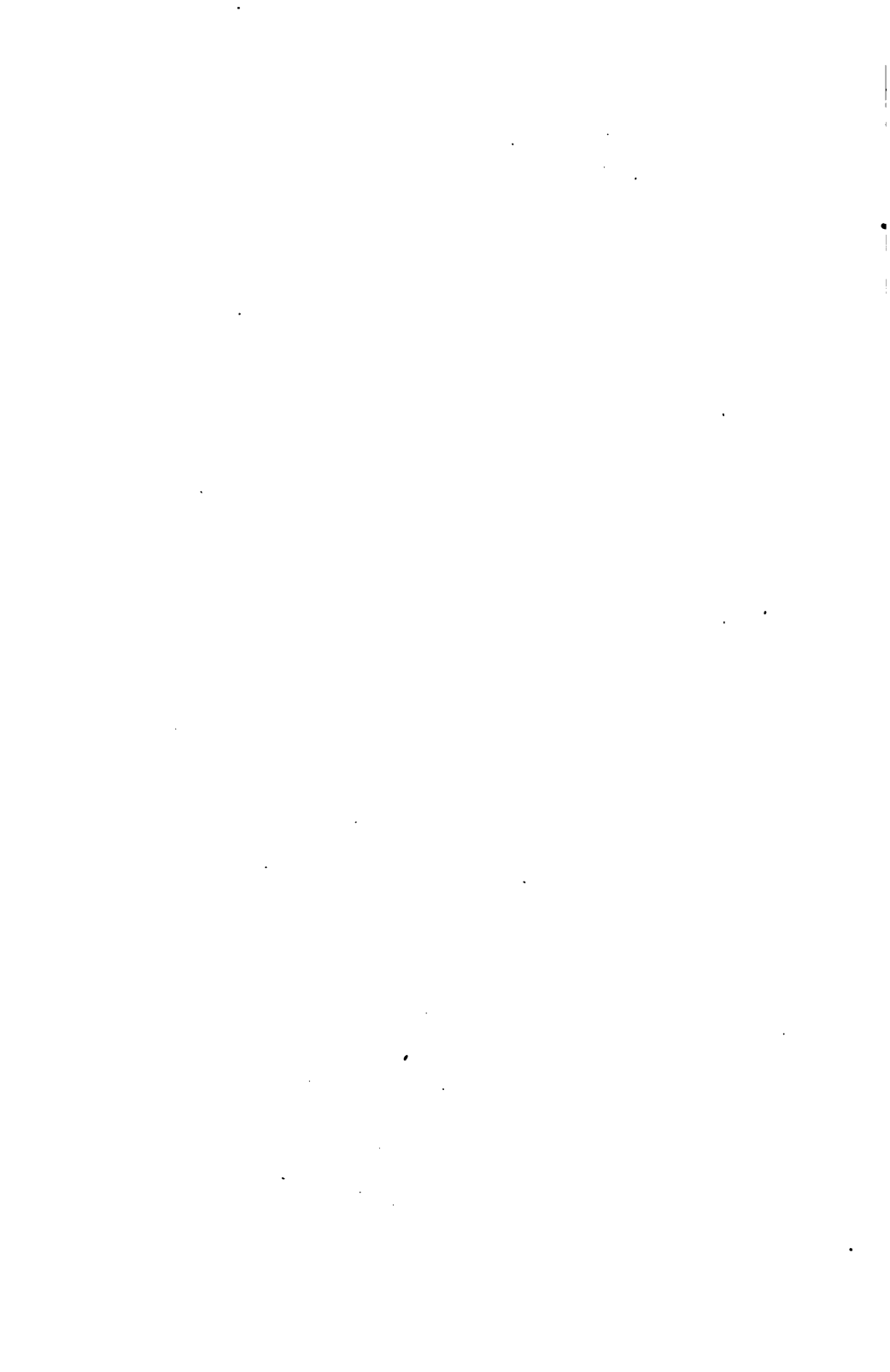


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MARRIED WOMEN'S PROPERTY.

The Doctrine of Separate Estate.

THE rule laid down by Lord *Hardwicke* in *Peacock v. Monk* (2 Ves. 190), and re-stated and adopted by Lord *Thurlow* in the leading case of *Hulme v. Tenant* (1 Bro. C. C. 19), that “a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she was a *feme sole*,” is the basis upon which is founded the equitable doctrine of separate estate. In Courts of Law a married woman, save in certain exceptional cases, as where the husband was an outlaw, had until the passing of the “Married Women’s Property Act, 1870” no recognised status: her position was one of disability and immunity. In Courts of Equity the case was different; she was indeed held incapable of binding herself personally, but her rights and liabilities in respect of her separate property were fully recognised. To quote again from the judgment of Lord *Thurlow* in *Hulme v. Tenant*, “if a Court of Equity says a *feme covert* may have a separate estate, the Court will bind her to the

whole extent, as to the making that estate liable to her own engagements, as for instance, for payment of debts" (*ibid.* p. 21).

Her status since the Married Women's Property Act, 1870, and Amendment Act, 1874.

Since the passing of the "Married Women's Property Act, 1870," and the "Amendment Act, 1874," a great, if not a radical, change has been effected in the legal status of married women. They are now enabled to acquire, during the coverture, certain classes of property to their separate use, in respect of which they have an independent personal status in all Courts alike; and are capable of taking such proceedings therein as may be necessary for the protection and security of such property, freed from the disabilities which have hitherto attached to coverture. It appears, however, that, with certain exceptions to be hereafter noted (p. 20), the mode in which creditors of the separate estate may enforce their rights is not in any way varied by the above-mentioned Acts; and, notwithstanding the provisions of the Supreme Court of Judicature Act, 1875, it is probable that their remedy will in most cases be pursued, as formerly in Courts of Equity, so now in the Chancery Division of the High Court. It will be necessary, before dealing with the provisions of the Acts, to consider briefly what powers of disposition over their separate property were previously enjoyed by married women, and what was the extent and nature of their creditors' rights and remedies against such property.*

* See further, as to a married woman's rights and liabilities in

A married woman's power of disposing of her separate estate by act *inter vivos*, or by will, has been held to extend to her personal property, whether in possession (*Fettiplace v. Gorges*, 1 Ves. 45), or in reversion (*Sturgis v. Corp*, 13 Ves. 190), and to her life interest in the rents and profits of real estate (*Stead v. Nelson*, 2 Beav. 245). The partiality, however, with which the rights of the heir have ever been regarded at Common Law caused Courts of Equity in a long series of decisions to deny to married women the right to alienate the fee, though settled to their separate use, except by means of a fine or recovery, or since 1833 by deed duly acknowledged under the provisions of the Act 3 & 4 Will. 4, c. 74.

Power of disposition over separate personal estate.

Rents of real estate.

This anomaly still continues as regards the legal fee,* but, after some conflict of decisions, has at length been removed so far as regards the equitable fee; and since the case of *Taylor v. Meads* (34 L. J. Ch. 203; 13 W. R. 394), decided on appeal by *Westbury*, L.C., it may be considered as settled, that, where lands are vested in trustees to the separate use of a married woman in fee,

* Power of alienating the equitable fee by deed or will, where legal estate in trustees.

respect of her separate property, Bright's 'Husband and Wife,' and notes to *Hulme v. Tenant*, 1 White and Tudor's Leading Cases in Equity, 481, *et seq.* 4th Ed.

* A statutory exception to this rule has, however, recently been created. By sect. 6 of the Vendor and Purchaser Act, 1874, when any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. As to the meaning of "bare trustee," see Dart's 'Vendors and Purchasers,' 5th Ed., p. 517; *Christie v. Ovington*, L. R. 1 Ch. Div. 279.

she has a complete power of alienating the equitable fee by deed, though not acknowledged under the statute, or by will.

Accordingly in the recent case of *Pride v. Bubb* (L. R. 7 Ch. 64; 20 W. R. 220; 41 L. J. Ch. 105; 25 L. T.N.S. 890), where real estate was vested in trustees for the separate use of a married woman, under the provisions of a deed of separation duly executed by her husband and herself, it was decided by *Hatherley*, L.C., that she had a good power of disposition by will or deed unacknowledged. "It cannot," said his Lordship, "be now disputed that, when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed. The object of this deed is clearly to place this lady, with reference to all her real property whatsoever and wheresoever acquired, in exactly the same position as if she had no husband at all. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord *Westbury* (*vide Taylor v. Meads*), that she would hold as a *feme sole*, and be able to make a will, the husband being placed out of the way."

So too where
no trustees are
interposed.

In *Hall v. Waterhouse* (13 W. R. 633; 11 Jur. N.S. 361) it was decided that the right of alienating the equitable fee attaches, where lands are vested in a married woman to her separate use without the intervention of trustees. In the latter class of cases, however, if it is

desired to secure the protection of the legal estate, as for instance in a mortgage, the deed must still be acknowledged under the Act.

Though the cases above referred to extend in terms only to the power of disposition by deed or will, the principle extends to instruments of a less formal nature. It is clear that, subject to the requirements of the Statute of Frauds being complied with, a married woman may bind her separate real estate by contract, and that specific performance will be enforced by decree against her separate property (*Gaston v. Frankum*, 2 De G. & Sm. 561; *Picard v. Hine*, L. R. 5 Ch. 274; see *Nicholl v. Jones*, L. R. 3 Eq. 696). As to a married woman's power to contract, see *post*, p. 49.

The history of the separate estate shows a gradual extension of the rights of creditors against such estate, where not protected by the restriction against anticipation. It was at first held that express charges alone would affect a married woman's separate property. After a time the rights of creditors claiming under a certain class of securities, such as bonds, bills of exchange, or promissory notes, were admitted against the separate estate, though not expressly referring thereto; and finally it has been decided that a married woman's general engagements, though not expressed in writing, will, with certain exceptions, bind her separate estate.

The judgment of *Turner*, L.J., in *Johnson v. Gallagher* (30 L. J. Ch. 298; 9 W. R. 506; 3 D. F. & J. 494), where the cases are fully considered, and the principles regu-

Alienation by contract.

Rights of creditors against the separate estate.

Johnson v. Gallagher.

lating the rights of creditors are laid down with a fulness and precision which has since made it a leading case on the liability of married women in respect of their separate estate, will best illustrate the growth of the doctrine and the existing state of the law upon this point.

In that case the bill was filed by the assignees in bankruptcy of a trade creditor of Mrs. G., to charge her separate estate, she having carried on a separate business apart from, and with the consent of, her husband. On the whole case His Lordship dismissed the bill, on the ground that an assignment by Mrs. G. to secure the debt of another creditor, though it comprised all her property, and was made after the filing of the bill, was upon the evidence good as against general creditors, who had no specific charge.

Circumstances under which separate estate is bound.

Lord Justice Turner, in his judgment, drew the following distinctions, which are worthy of attentive study, as the principles there laid down must apparently govern cases as to contracts made with, and credit given to, a *feme covert* under the "Married Women's Property Act, 1870."

Express charges bind the separate estate.

—"It has not, so far as I am aware, ever been disputed that married women may encumber their separate estates by mortgage or charge. When any question has arisen on such securities the question has been, not on the right to create the security, but upon the circumstances under which it has been created. . . .

So also bonds, bills, and notes.

"Again, there are very many cases which have established that the bonds, bills of exchange, and promissory

notes of married women are payable out of their separate estates. . . .

“It has been a more disputed, and is a more doubtful ^{And general engagements.} question, whether the separate estates of married women are liable for their general engagements, such as tradesmen’s bills and claims of that description. Looking at this question without reference to authorities, it is difficult to see upon what ground debts of this class can be distinguished from debts of the class to which I have last referred ; what distinction there can for this purpose be between debts by specialty and debts by simple contract, and, still more, what distinction there can be between simple contract debts of different descriptions ; and, if no sound distinction can be drawn between the different classes of debts, the authorities which apply to the one class must, as it should seem, govern the other. . . . The weight of authority seems to me to be in favour of the liability ; and I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it ; and upon the whole, therefore, I have come to the conclusion that not only bonds, bills, and promissory notes of married women, but also their general engagements may affect their separate estates, except as the Statute of Frauds may interfere where the separate estate is real property. I am not prepared, however, to go the length of saying that the separate estate will in all cases be affected by a mere general engagement. . . . What might affect the

separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. . . . According to the best opinion which I can form on a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that *the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so made or not is a question to be judged of by this Court upon all the circumstances of the case.*"

If entered into with reference to and upon the credit of the separate estate.

His Lordship, after reviewing the authorities on the question whether there had been any contract binding the separate estate, proceeded as follows:—"The defendant, *Jane G.*, at the time when the goods for which the plaintiffs claim to be paid were ordered and furnished, was living separate from her husband, and the evidence, I think, shows that the tradesmen who supplied the goods supposed and believed that she had separate estate, and dealt with her upon that assumption. So far, therefore, as they were concerned, they dealt on the footing of separate estate. How was it, then, on the part of the defendant? She was, as I have said, living separate from her husband, and had separate estate, and I think that, *where under such circumstances a married woman contracts debts, the Court is bound to impute to her the intention to deal with*

The fact that husband and wife are living apart, strong evidence that separate property is bound.

her separate estate, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchased."

It is not necessary to the application of this doctrine that the separation between the husband and wife should be a legal one; a separation in fact may suffice to bring the woman within the principle. See *McHenry v. Davies* (L. R. 10 Eq. 88; 18 W. R. 855). In that case a married woman living abroad, alone, under circumstances which led to the belief that she was a *feme sole*, indorsed a bill of exchange, and drew a cheque on her London bankers for the purpose of enabling T., who acted as her agent, to raise money. The bill and cheque were cashed by M., a banker at Paris, but were dishonoured. It was held that the separate estate of the married woman was liable to make good to M. the amount, irrespective of any equities between her and T. Recent instances of a married woman being compelled to pay a bill of exchange and a note will be found in *Lancashire and Yorkshire Bank v. Tee*, W. N. 1875, 213; *Davies v. Jenkins*, L. R. 6 C. D. 728.

The fact that husband and wife were living together at the time when the debt was incurred is strong evidence to show that the obligation is not such as to bind the wife's separate estate, and apparently throws on the creditor the *onus* of proving that the separate estate was intended to be bound. And though a debt, originally that of the husband, may be adopted by the wife, and where there is a sufficient consideration will then bind her separate property, yet the intention to charge that

Separation
need not be
legal.

Where
husband and
wife are living
together, *onus*
on creditor
to show
that separate
estate is bound.

Intention to
charge separate
estate
must be clear,
and trans-
action free

from imposition, duress, or fraud.

property must be clear, and the transaction must be free from objection on the ground of imposition, duress, or fraud.

Bromley v. Norton.

These principles are illustrated by the case of *Bromley v. Norton* (21 W. R. 155). There a claim was made, in a suit for the administration of the estate of Mrs. B., by the landlord of the Hôtel d'Angleterre, at Baden-Baden, in respect of the balance of his account, of which he had been unable to obtain payment from Mr. B. The hotel bills had been made out during a stay of three months in the name of Mr. B. and family. In October, 1865, Mr. B. left the hotel suddenly, owing bills to the amount of 400*l.* Mrs. B., with her children, remained in the hotel, and was detained by the hotel keeper and, under his orders, prevented by the police from leaving the hotel. A further debt was, in the meantime, incurred. Ultimately Mrs. B.'s father, hearing what had happened, sent his secretary, who, with Mrs. B., signed a document in French, which, as translated, was as follows:—"The debt of Monsieur S., Hôtel d'Angleterre, against Madame B., is fl.5,305.51. On account of the above sum I pay through Messrs. Muller and Co., by order of M. (the father), 100*l.* sterling, and another 100*l.* will be paid in June 1866. Monsieur declares, through me, that he thinks and hopes that the remainder of the above debt will be paid." Upon payment of 100*l.* Mrs. B. was released, and it was argued that this release was a sufficient consideration for the memorandum, as a charge upon her separate property. *Malins, V.C.*, in

deciding against the claim, said, "that in order to bind a separate estate by a general engagement, the credit must be given upon reliance on the separate estate. When a married woman is separate from her husband, the Court would consider that she was contracting upon the strength of her separate estate. *But there is no case where, when husband and wife are living together, it presumes that there is an intention to resort to the separate estate.* Monsieur S.'s only right, therefore, was through the memorandum, but in looking at the memorandum the Court must look at the surrounding circumstances. . . . The landlord was bound to know that it was not her debt, and that she only said it was her debt in order to escape from duress."

It must be noted that the separate estate is not bound, Separate estate not bound, where restraint on anticipation. where the married woman is restrained from anticipation (*Olive v. Carew*, 1 J. & H. 199). Therefore, where she is so restrained, her note of hand is *nudum pactum* against her property so settled; and the property cannot be reached, even when she has become discovert, if she has in no way acknowledged or ratified the contract since her husband's death (*Roberts v. Watkins*, 46 L. J. Q. B. 552; 36 L. T. N.S. 799). In one case however, viz., where the married woman Exception. is sued under the 12th section of the Act of 1870 for an ante-nuptial debt, the restraint on anticipation is no preservative of her separate estate, the legislature thinking, that, as the liability of the husband was taken away, it was only just that the liability should be fastened on the whole property of the wife (see *Sanger v. Sanger*, L. R. 11 Eq. 470).

Court will not suffer the restriction to be got rid of.

An attempt to get rid of the restriction upon anticipation, though made *bonâ fide*, will not be permitted by the Court. See *Martana v. Martana* (W. N. 1875, 245). In that case Mrs. M. was, under her settlement, entitled to the income of the trust funds for life for her separate use without power of anticipation, the corpus being divisible among her children as she should appoint. She appointed the whole fund to her only child. The latter attained 21, and a resettlement was executed under which the fund was settled upon trusts to pay the income to the mother for life for her separate use, and after her death for her daughter absolutely. On an application to transfer the fund to the trustees of the resettlement, *Bacon*, V.C., only made the order subject to the resettlement being re-executed, with the insertion of a clause restraining anticipation.

A married woman may bind her separate estate by the acts and representations of her agent.

A married woman may bind her separate estate by the acts and representations of her agent: *Gaston v. Frankum*, 2 De G. & Sm. 561; *McHenry v. Davies*, L. R. 10 Eq. 88; 18 W. R. 855. In the former case the separate estate was held bound by the letters of the married woman's solicitors. In the latter case, a married woman had drawn a cheque in favour of T., in order to enable him to raise money. Lord *Romilly* in his judgment said: "It is a fundamental principle of Equity, that if a *feme covert* employs a person in the situation of T. to act as her agent and amanuensis, and afterwards gives documents to the same person, with her name on them, for the express purpose of enabling him to raise

money on the credit of her name, she is liable to make good out of her separate estate, to the person advancing money on the faith of her name, the amount he has so advanced. Were it otherwise, it would be merely making this Court a party to defrauding an innocent man out of money, which he could have no notice or suspicion would not be repaid."

But the separate estate of a married woman is not in Torts, general liable for breaches of trust or torts committed by her (*Wainford v. Heyl*, L. R. 20 Eq. 321).

The law above stated as to the liability of the separate estate to the engagements and torts of a married woman is thus summarised by the M. R. :—

"The principle, as I have always understood it, is this: a married woman is liable—or rather her separate estate is liable (for there is no personal liability as far as she is concerned*)—to make good all contracts which are made by her with express reference to the separate estate, or which from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which from their nature cannot be so inferred; *a fortiori*, she is not liable for general torts, but her husband is liable. Her separate estate may be liable for a fraud relating to the separate estate, that is dealing with the separate estate by way of fraudulent representation. Again the estate may be made liable for an actual appropriation of funds subject to the same

* See *Francis v. Wigzell*, 1 Madd. 264.

settlement and the same trusts which create the separate estate; in other words, the trustees or persons claiming to be entitled to these other funds may say as against the married woman entitled to the separate estate, 'You have received by anticipation' (she not being restrained from anticipation) 'a part of the separate estate coming to you under that settlement.' That, as I understand, is the decision in *Clive v. Carew* (1 J. & H. 199). But, apart from such cases as these, one cannot see why she should be made liable for general torts in reference to trusts any more than for general torts at law. Strictly speaking, she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability." (*Ibid.*)

Property over which a married woman has a general power of appointment liable for her debts.

The London Chartered Bank of Australia v. Lemprière.

The question has often been raised, whether property, over which a married woman has a general power of appointment, is liable to the payment of her debts. That such is the case, where a man has actually exercised such a power, is well established (*Jenney v. Andrews*, 6 Madd. 264; 1 White and Tudor's Leading Cases, p. 495); and the recent case of *The London Chartered Bank of Australia v. Lemprière* (L. R. 4 P. C. 572; 21 W. R. 513; 42 L. J. P. C. 49; 29 L. T. N.S. 186) establishes, that a similar doctrine is applicable in the case of married women, and overrules various earlier decisions to the contrary. There, Mrs. A. was entitled to large personal estate to her separate use for life, with remainder as she should by deed or will appoint, with remainder in default of appointment to her executors and administrators.

There was no restraint against anticipation. At the request of her bankers she gave them a letter, signed by herself and her husband, charging certain funds comprised in the settlement, as security for her overdrafts. On her death, after exercising by will her power of appointment, a large sum was due on her overdrawn account, which the bankers sought to charge on the settled property. The Courts of Victoria decided that there was no charge; but on appeal to the Privy Council their decision was reversed. *James, L.J.*, after stating the limitations of the settlement, there said, that "their Lordships were satisfied that, on the weight of authority and on principle, they ought to treat this, as what it was in common sense, and to common apprehension, it would be, *an absolute gift to the sole and separate use* of the lady. That the words were an expansion and expression of what would be implied in the words sole and separate use; and they conceived themselves at liberty to hold that such a form of gift to a married woman, without any restriction against anticipation, vested in equity the entire *corpus* in her, *for all purposes, as fully as a similar gift to a man would vest it in him.*" And the rule is the same where the life estate follows, as where it precedes, the power of disposition (*Mayd v. Field*, L. R. 3 C. D. 587; 24 W. R. 660; 45 L. J. Ch. 699; 34 L. T. N.S. 614). "The true view seems to be this, that, for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will, that is her separate property so as to be

Result of the cases.

subject to her general engagements" (per the M.R., *ibid.*). The possession of a complete power of disposition is sufficient; it is not necessary that the power should have been exercised. In the case of *Heatly v. Thomas* (15 Ves. 596), cited with approval in the judgment of *James*, L.J., where the power was exercisable by will only, a married woman's bond was held to bind the corpus of the appointed fund.

Rights of creditors in administration of separate estate.

In administering the estate of a married woman after her decease, her separate property is treated as equitable assets, and is distributed among her creditors *pari passu* (*Owens v. Dickenson*, Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90; *Thompson v. Bennett*, L. R. 6 C. D. 739; *vide contra Shattock v. Shattock*, L. R. 2 Eq. 182*).

Separate property, how created independently of the Act.

Before the Act of 1870 separate property might have been, and of course may still be, created in various ways. Thus, as is laid down by Lord *Langdale* in *Tullett v. Armstrong* (1 Beav. 21), it may be acquired "either by

* Certain *dicta* of *Romilly*, M.R., in *Shattock v. Shattock* (*ubi supra*) leave it doubtful how far general engagements, not expressly charging the separate estate, constitute debts provable against that estate after death. The tendency of recent decisions, however, is clearly in favour of making the liability of the separate estate, in respect of a married woman's debts and engagements, co-extensive with her power of disposition over her separate property, and of sweeping away distinctions based on the form in which the obligation was contracted, wherever an intention is expressed, or may be implied, to deal with that property. *Shattock v. Shattock* was disapproved of in *London Chartered Bank of Australia v. Lemprière* (*ante*, p. 14).

contract with the husband before the marriage, or by gift from him or from any stranger wholly independent of such contract." It may also be created by special agreement between husband and wife after marriage (*Haddon v. Fladgate*, 1 Sw. & Tr. 48; *Pride v. Bubb*, L. R. 7 Ch. 64; 20 W. R. 220; 41 L. J. Ch. 105; 25 L. T. N.S. 890), or by the husband's acquiescence (*Ashworth v. Outram*, L. R. 5 Ch. Div. 923; 25 W. R. 896; 46 L. J. Ch. 687; 37 L. T. N.S. 85; *Lumley v. Timms*, 21 W. R. 494; 28 L. T. N.S. 608).^{*} Savings out of alimony awarded to a wife judicially separated are part of her separate estate (*Moore v. Barber*, 5 Giff. 43). If a wife is deserted by her husband, she is apparently entitled, apart from the provisions of 20 & 21 Vict. c. 85, s. 21 (i.e. without obtaining a protection order) to hold property, acquired by her after desertion, to her separate use (*Cecil v. Juxon*, 1 Atk. 278; *Re Pope's Trusts*, 21 W. R. 646; W. N. 1873, 79);—and *Malins*, V.C., has ordered a legacy of £500 bequeathed to a married woman, deserted by her husband, but who had obtained no protection order, to be paid to her as a *feme sole* (*Re Kennerley's Trusts*, 8 May, 1874).†

^{*} Cases of agency must be distinguished. See and consider *Lloyd v. Pughe*, L. R. 8 Ch. 88; 21 W. R. 346; 42 L. J. Ch. 282; 28 L. T. N.S. 250.

† Of course, where a married woman has obtained a protection order under 20 & 21 Vict. c. 85, sect. 21, her status is abundantly clear, though questions may arise as to whether, in the particular case, this or that particular property comes within the terms of the Act, so as to be protected. A recent decision on this head is to be found in *Re Coward and Adam's Purchase* (L. R. 20 Eq. 179; 23

Where, also, after being judicially separated, the wife returns to cohabitation, under 20 & 21 Vict. c. 85, s. 25, she holds the property to her separate use.

Rebble,
doctrine of
separate
estate legal
now as well
as equitable.

Inasmuch as, where there is any variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity are to prevail (Supreme Court of Judicature Act 1873, sect. 25, sub-sect. 11), it would seem that the rights and liabilities in respect of separate estate created independently of the Act of 1870, which married women formerly enjoyed and were subject to in the late Court of Chancery alone, must now be recognised and (so far as the machinery of any Division may be adequate thereto) enforced in all the Divisions of the High Court of Justice.

Married
Women's Pro-
perty Act,
1870.

Under the "Married Women's Property Act, 1870," a new class of separate property, which for the sake of distinction may be called statutory separate property, is created. A distinction must therefore be taken between statutory separate property, to which alone, as it appears,

Separate
estate now

W. R. 605; 44 L. J. Ch. 384; 32 L. T. N.S. 682). There a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, was deserted by him, and obtained a protection order; and it was held that the legacy, on being paid to her after the date of the order, was property which then came or devolved upon her within the meaning of the Act, and that her receipt was a good discharge.

It would seem that where a woman sues as a *feme sole* under the provisions of this Act, she should at each of the chief stages of the action produce evidence that the desertion or judicial separation is a continuing one. See *Ewart v. Chubb*, L. R. 20 Eq. 454.

the extended rights conferred on married women by that Act are intended to apply, and those interests which until ^{divisible into} the recent fusion of the Courts of Law and Equity were recognised as separate property in Courts of Equity alone.

Under the first class will come all earnings acquired (1) statutory. after the passing of the Act (August 9, 1870), in any trade or occupation which a married woman shall carry on separately from her husband, and all investments of such earnings (sect. 1); deposits or investments to a married woman's separate use under sects. 2, 3, 4, and 5; personal property without restriction as to nature or value devolving *ab intestato* on a woman married after the passing of the Act, as well as sums of money not exceeding 200*l.* to which she may become entitled under any deed or will (sect. 7); the rents and profits of real estate descending to her (sect. 8); and policies of insurance effected to a married woman's separate use (sect. 10). Property belonging to a woman before marriage, which her husband has by writing under his hand reserved to her separate use, will also apparently be statutory separate property, for the purposes of sect. 11.

Separate property arising in any other mode, not (2) equitable. falling under the Act, will constitute the second class. It will be observed that an express trust for separate use will still be necessary as before the Act, in the case of real and personal property, other than sums of money not exceeding 200*l.*, left by deed or will. Property so limited to the separate use, unless it be property belonging to the wife "before marriage, and which her

husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property" within the meaning of sect. 11, will not carry with it the legal rights conferred by the Act, though it will apparently be subject to the liabilities imposed upon married woman by sects. 13 and 14 of the principal Act, and sect. 12 as amended by the Act of 1874.

Investments
by married
women.

Married women are now enabled to invest their separate property in savings banks and government annuities (sect. 2), in the public funds (sect. 3), in shares and debentures, to which no liability is attached, in any incorporated or joint-stock company (sect. 4), and in similar shares in friendly and benefit societies duly registered (sect. 5), so as to obtain a good legal title thereto, as statutory separate property. And see note (d) to sect. 1 of the Act. As between husband and wife it appears that these clauses cannot be intended to give more than a *primâ facie* title, unless the investment is made with his consent, and that all equities are left untouched.

Husband's
creditors.

The rights of creditors of the husband are reserved by sect. 6, where property has been fraudulently settled by him on his wife; and the creditors are enabled to follow such property, as if the Act had not passed.

Wife's
creditors.

It does not appear that any remedy at Law is given to the wife's creditors against her separate property, except in the cases falling within sects. 13 and 14 of the principal Act, and sect. 12, amended by 37 & 38 Vict. c. 50, though they probably possess it under the recent legislation (see *ante*, p. 18); but, however that may be,

in all cases of separate property other than such as is created by the principal Act, the creditor's remedy will probably still be (for the sake of convenience, if for no other reason) by action in the Chancery Division or equitable plaint in the County Court, to charge her separate estate. Compare and distinguish the language of 20 & 21 Vict. c. 85, ss. 21, 26 (App. pp. 69, 70).

Questions between husband and wife, in relation to separate estate made such by the Act, may, under sect. 9,
Questions between husband and wife.
 be decided on summons or motion in a summary way, without any limit as to the value of the property involved. This section, however, is permissive only, and the ordinary jurisdiction of the late Court of Chancery no doubt extends to statutory separate property, and it will be in the discretion of the parties to choose their remedy under this section, or according to the ordinary practice, as the nature and complexity of the circumstances may require.

The power which married women possess, under sect. 11, of maintaining an action at law is confined (so far
Wife's action at law.
 at least as regards power derived from the Act under consideration; but see *ante*, p. 18) to the cases arising on statutory separate property; but, subject to that qualification, the right extends to all women, whether married before or after the 9th of August, 1870. The right of action attaches to property belonging to the wife *before* marriage, and which the husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property. This provision will

apply to settlements to which the husband is a party, as well apparently as other less formal instruments; but where, as is usually the case, the property is vested in trustees for the wife, it is apprehended that the action must still be brought in the name of the trustees, where anything more than the merely equitable interest of the wife is concerned.

Wife responsible for debts contracted before marriage.

The husband is (in cases not falling within the Amendment Act), by sect. 12, released from liability at law to be sued for his wife's debts contracted before marriage. Creditors have now, in respect of such debts, a legal remedy against the wife, who is liable to the extent of her separate property, even though the same may have been subjected to a restraint upon anticipation. The section does not appear to provide for the case where property of the wife has, either innocently or by collusion, been permitted to vest in the husband on marriage, so as to defeat the rights of her creditors. It appears probable, however, that, by analogy to the cases of fraudulent settlements, a remedy would be given to the creditors on proof of the intention to defraud, against such property of the wife as has vested in the husband in his marital right.

The husband responsible for his wife's torts or breaches of contract.

The section is express in restricting the husband's immunity and the creditor's rights against the wife to debts, and does not give a right of action against her in respect of her torts or breaches of contract committed before marriage, for which the husband is left alone liable. This omission is supplied in the Amendment Act, as regards women married after the 30th of July, 1874.

By sect. 13, the wife, if possessed of separate property, is made liable to maintain her pauper husband, and by sect. 14, her children, when the father has ceased to maintain them, yet so as not to affect his primary liability. In both of these cases the usual legal remedies to procure payment are made applicable to married women.

The Act, which came into operation on the 9th of August, 1870, does not apply to Scotland. (Sects. 15 and 16.)

The defects of the 12th section of the "Married Women's Property Act, 1870," were remedied by an Amendment Act (37 & 38 Vict. c. 50), which came into operation on the 30th of July, 1874, and repeals, *as regards marriages solemnised after that date* (sect. 1), the 12th section of the principal Act, so far as it enacts that the husband shall not be liable for his wife's debts contracted before marriage.

The "Married Women's Property Act (1870) Amendment Act, 1874."

The husband and wife may, under the Amendment Act, be sued jointly for any such debt (sect. 1), and also for damages for any tort or breach of contract committed or made by the wife before marriage; and judgment may be recovered against the husband and wife jointly to the extent of any assets, for which the husband is liable, and as to the residue, if any, of such debt or damages separately against the wife (sects. 2, 4).

The husband's liability for his wife's debts, torts, and breaches of contract, limited to the extent of his assets.

Assets, in respect of which the husband is liable, comprise the value of such chattels real and personal as vest in him in right of his wife; the choses in action of the wife, and the rents and profits of her real estate, which the husband has, or with reasonable diligence might

What are assets.

have, reduced into possession and received; any estate or interest settled by the wife on the husband, or on any other person, in contemplation of her marriage; and any property which the wife, in contemplation of her marriage with him, shall have transferred to any other person in fraud of her existing creditors.

The husband exonerated to the extent of any debts paid by, or judgment recovered against him, on behalf of his wife.

Husband's costs.

The husband may (sect. 5) give evidence, showing that he has paid debts of his wife, or had judgment recovered against him in any such action as is mentioned in the Act, and will be exonerated from liability to the extent of any such payment or judgment. If it is not found (*sic*) that the husband is liable in respect of any such assets, as are mentioned in the Act, he is entitled to his costs of judgment, whatever may be the result of the action as against the wife (sect. 3).

The Amendment Act does not extend to Scotland (sect. 6).

MARRIED WOMEN'S PROPERTY ACT, 1870.

(33 & 34 VICT. CAP. 93.)

*An Act to amend the Law relating to the Property of
Married Women.* [9th August, 1870.]

WHEREAS it is desirable to amend the law of property and contract with respect to married women :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. The wages and earnings (a) of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade (b) in which she is engaged or which she carries on separately from her husband (c), and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments (d) of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use (e), independent of any husband to whom she may be married, Earnings of married women to be deemed their own property.

and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

Stock-in-trade and capital.

(a) The "wages and earnings" include by implication the stock-in-trade and capital, without which there could be no wages or earnings (*Ashworth v. Outram*, L. R. 5 Ch. Div. 923; 25 W. R. 896; 46 L. J. Ch. 687; 37 L. T. N.S. 85).

Lawful occupations only protected.

(b) The protection afforded by the Act, in accordance with the general policy of the law, extends only to lawful occupations and trades. See *Mason v. Mitchell* (3 H. & C. 528; 34 L. J. Ex. 68) decided under 20 & 21 Vict. c. 85, s. 21, where property of the wife, acquired by keeping a disorderly house, was held not to be entitled to protection against the husband claiming in his marital right.

Agreement between husband and wife as to separate business.

(c) An agreement between husband and wife, that she shall carry on a separate business, if made before marriage, is binding both on the husband and his creditors—if after marriage, on the husband alone (see the judgment of Malins, V.C., in *Ashworth v. Outram*, L. R. 5 Ch. Div. 923; 25 W. R. 896; 46 L. J. Ch. 687; 37 L. T. N.S. 85, and the authorities there referred to). This distinction is based on the wife's inability to contract during coverture, and is not affected by the present Act, which does not give married women any additional power to contract, except as incident to property by the Act declared to be for their separate use (see the remarks of the M. R. in *Howard v. Bank of England*, cited *post*, p. 49), but a wife having under the Act a right, independently of contract with her husband, to trade separately will be equally protected against claims made by her husband or his creditors under the powers given her by sects. 9 and 11.

Question of fact.

The question whether the business is carried on by her separately is one of evidence, to be determined on the circumstances of the case (*Smallpiece v. Dawes*, 7 C. & P. 40). It is desirable, in order to avoid questions, that the husband should give his written consent to the carrying on of such separate business.

Intermeddling of husband.

Although a separate business may be carried on by a wife while residing with her husband, yet, if a husband takes such a part in his wife's business as to make himself personally liable, the business

is not carried on separately from the husband within the meaning of this Act (*Laporte v. Cosstick*, 23 W. R. 131; 31 L. T. N.S. 434.)

(d) It does not appear that a married woman's power of investing her earnings under this section is to be restricted to those classes of investments for which special facilities are given by sects. 2, 3, 4, and 5; but that, on the contrary, all investments of such earnings, being "property by this Act declared to be her separate property," will carry with them the various legal rights and incidents conferred by the Act. Thus furniture, stock-in-trade, or plant purchased out of wages or earnings, will be as much separate property as the wages or earnings themselves; and this view of the construction to be put upon the section is confirmed by the language of sect. 11, which extends the civil and criminal remedies thereby given to any "chattels or other property purchased or obtained" by means of any "wages, earnings, money, and property," declared by the Act to be separate property. What investments are within the section.

Where investments are made in real estate, the equitable fee may be disposed of by the wife by act *inter vivos*, without the forms prescribed by the Act for the Abolition of Fines and Recoveries, or by will (*Taylor v. Meads*, 34 L. J. Ch. 203; 13 W. R. 394; *Hull v. Waterhouse*, 13 W. R. 633; 11 Jur. N.S. 361; *Pride v. Bubb*, L. R. 7 Ch. 64; 20 W. R. 220; 41 L. J. Ch. 105; 25 L. T. N.S. 890). Real estate.

Where lands were purchased in part out of proceeds of the wife's separate estate, and conveyed to her husband in fee, the wife was held entitled to a charge thereon for the amount so advanced by her, with interest from the date of her husband's death (*Scales v. Baker*, 28 Beav. 91; *cf. Darkin v. Darkin*, 17 Beav. 578). Purchased in part out of separate estate.

Where no disposition has been made by the wife of her real estate so purchased, it will descend on her death to her heir, subject to the payment of her debts. It appears to be doubtful whether the husband can claim his estate by curtesy in his wife's separate estate of inheritance. In *Moore v. Webster* (L. R. 3 Eq. 267) the decision was against the husband's right; while the contrary conclusion was arrived at in the later case of *Appleton v. Rowley* (L. R. 8 Eq. 139). Where the separate use extends to the *life estate only*, and does not extend to the remainder in fee, there On intestacy, subject to debts, and curtesy—query.

appears to be no doubt on the authorities as to the husband's right by curtesy. See cases cited in note (b), sect. 8.

Form of conveyance.

To avoid difficulties in dealing with the legal estate, the conveyance, in cases where land is acquired under this section, should be taken to such uses as the wife shall appoint, and in default of appointment to her separate use in fee. See Davidson's 'Precedents and Forms in Conveyancing,' Vol. II, pt. i. ed. 4, Precedent XI.

Rights and liabilities under the Act in respect of separate estate.

(e) The effect of the Act is to place women, whether married before or after the passing of the Act (August 9th, 1870), in the position of *femes sole* in respect of the beneficial enjoyment of property acquired after the Act by their industry or skill. As regards this class of property, and all other separate property made such by the Act, they have a personal legal status, with power to enter into contracts, give receipts, and pursue their remedies, civil and criminal, in relation to such separate property in their own name, free from the incapacities hitherto consequent on coverture; while at the same time they apparently retain, with the exceptions falling within sects. 12 (as amended by 37 & 38 Vict. c. 50), 13, and 14, the personal immunity from adverse legal proceedings which they formerly enjoyed. They may deal with such separate property during their lifetime, or dispose of it by will on their death, free from the control of their husbands. Questions arising during the coverture between husband and wife, with regard to separate property made such by the Act, may under sect. 9 be settled in a summary way by summons or motion.

Contract.

Will.

Probate limited to statutory separate estate.

Where a woman had been deserted by her husband in 1866, and subsequently acquired property by her own industry, which she purposed to dispose of by will, probate was limited to her earnings since the passing of the Act. *In the Goods of Pepper*, 31 L. T. N.S. 272. But see *Cecil v. Juxon*, 1 Atk. 278; *Re Pope's Trusts*, 21 W. R. 646; W. N. 1873, 79 (*ante*, p. 17), which do not appear to have been cited.

The husband's rights in his deceased wife's separate estate.

Subject to any disposition which the wife may make in her lifetime by act *inter vivos*, or by will, the husband's rights after her death will re-attach unaffected by the Act. As against him the "intermittent fetter," as it has been called, of the separate use, which exists only as an incident of coverture, will then drop off,

and he will be remitted to his legal rights. Therefore on the death of the wife intestate, the husband will succeed to her real estate as tenant by the curtesy, where such right exists,—see note (d), *supra*, and note (b) to sect. 8; and to her personal estate, if in action, as her administrator (*Proudley v. Fielder*, 2 My. & K. 57), if in possession, in his marital right (*Molony v. Kennedy*, 10 Sim. 254), subject to the payment of her debts.

The separate property of a married woman will be liable during her lifetime to satisfy the demands of creditors, whose debts are

Creditor's rights.

either expressly or by implication charged thereon (*Johnson v. Gallagher*, 30 L. J. Ch. 298; 9 W. R. 506; 3 D. F. & J. 494; and cases cited, pp. 5-11, *ante*; *Bullpin v. Clarke*, 17 Ves. 365, the form of decree in which case is given *post*, p. 78). As to the precise nature of a creditor's rights, see *National Provincial Bank of England v. Thomas*, cited *post*, p. 51. After the death of the married woman her creditors may institute an action for the administration of her estate, which is treated as equitable assets, all debts being paid *pari passu* (*Owens v. Dickenson*, Cr. & Ph. 48; *Thompson v. Bennett*, L. R. 6 C. D. 739; see p. 16, *ante*).

Separate property is equitable assets.

As to proceedings in cases between husband and wife, see note (d) to sect. 9, and against strangers, note (l) to sect. 11.

II. Notwithstanding any provision to the contrary in the Act of the tenth year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post-office savings banks, any deposit hereafter made and any annuity granted by the said Commissioners under any of the said Acts in the name of a married woman (f), or in the name of a woman who may marry after such deposit or grant (g), shall be deemed (h) to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried

Deposits in savings banks by a married woman to be deemed her separate property.

Proviso.

woman : provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent (*i*), the Court may, upon an application under section nine of this Act, order such deposit or annuity or any part thereof to be paid to the husband.

Husband's right to wife's annuity or deposits.

(*f*) Under the old law the position of married women as regards deposits in savings banks and government annuities was precarious and uncertain. The husband, if he were so minded, could draw the deposit or claim the annuity in his wife's name on proof of the marriage: 26 & 27 Vict. c. 87, s. 31. Under the present section the wife has a legal title to deposits or annuities standing in her own name, subject, however, to the husband's equities, where such exist. See notes (*g*) and (*i*) *post*.

Annuities inalienable except on bankruptcy.

If it should be held that married women are not within the scope of the Bankruptcy Laws (as to this see *post*, p. 52), it seems that government annuities held by them are, under 16 & 17 Vict. c. 45, s. 25, absolutely inalienable, and cannot be made available for payment of their debts during coverture.

As to a married woman's rights and liabilities in respect of her separate property see note (*e*), sect. 1.

Fraud on marital rights.

(*g*) Property belonging to a woman before marriage cannot be validly appropriated to her separate use, except with the consent of her intended husband. Any such disposition without his consent will be held in equity a fraud on his marital rights. See note (*i*), sect. 3.

Onus of proof.

(*h*) Formerly, as separate property was not recognised at law, the onus was thrown upon the married woman of proving her title to such property. Now in all cases of statutory separate property, the wife having at law a good *prima facie* title, it will lie upon those who claim adversely to her to prove that property *alleged to be her separate property* within the meaning of the Act, is not in fact her separate property. As to the onus of proof see observations of Wood, V.C., in *Barrack v. M'Culloch* (3 K. & J. 119, 120; 5 W. R. 38), and see note (*l*), sect. 11.

(i) By this proviso the rights of the husband are reserved, where monies, either his own or coming to him in right of his wife, have been invested by her without his consent to her separate use. Husband's equities reserved under proviso. Subject to any right of set-off claimed by the wife, the husband is enabled under the 9th section to recover such moneys in a summary way. Sects. 3, 4, and 5 contain similar provisions. As to what personal property of the wife still vests in the husband in his marital right see note (z), sect. 7. As to the rights of creditors of the husband, where he has transferred property of his own to his wife's separate use, see note (x), sect. 6.

III. Any married woman, or any woman about to be married (j), may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds (k), and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use (l), and on such sum being entered in the books of the said governor and company accordingly the same shall be deemed (m) to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman (n); provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent (o) the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, As to a married woman's property in the funds.

or any part thereof, to be transferred and paid to the husband.

Transfer of stock.

(?) The effect of this section is, to enable women during coverture to hold sums of stock of 20*l.* and upwards to their separate use without the intervention of trustees. As to their rights and liabilities in respect of such stock, see note (e), sect. 1. The section applies equally to women married before and after the 9th of August, 1870.

When void against husband, as fraud on his marital rights.

An unmarried woman can avail herself of its powers only in contemplation of marriage, wherefore any transfer of stock to her separate use cannot be safely made without the concurrence of her intended husband. Unless made with his consent, expressed or implied, a transfer under this section would be voidable by him as a settlement in fraud of his marital rights.* (See *Countess of Strathmore v. Bowes*, 1 Ves. Jun. 22, and notes thereto, 1 Wh. and Tu. L. C. 406, *et seq.* 4th Ed., Davidson's 'Precedents and Forms in Conveyancing,' Vol. III. pt. 2, 3rd Ed., 706, n. (f)). It has been held to be immaterial that the husband before marriage was ignorant of the existence of the property (*Goddard v. Snow*, 1 Russ. 485). Actual fraud or deception practised on the husband need not be proved; suppression of the fact of the settlement will be constructive fraud (*St. George v. Wake*, 1 My. & K. 610; *Downes v. Jennings*, 32 Beav. 290). If, however, the husband becomes aware before marriage of the reservation of separate property by the wife, his subsequent marriage will be held an implied consent to such disposition of her property, and a waiver of his right to set it aside (*St. George v. Wake*, 1 My. & K. 622; *Ashton v. M'Dougall*, 5 Beav. 56).

Transfer of fund in Court with consent of the husband.

Where a married woman was entitled for life to the income of a sum of consols, the Court, under this section, *with the consent of the husband* and the reversioner, ordered a transfer into her name as a

* The forms of application furnished by the Bank of England under this section provide for the concurrence of the husband or intended husband in such application. It is understood that the Bank further requires a statutory declaration to be made by both of the parties.

married woman entitled to her separate use (*In re Bartholomew's Estate*, W. N. 1870, 234; 19 W. R. 95; *Frank v. Mackery*, Ir. R. 8 Eq. 93). But where the woman was a ward of Court, the fund was ordered to be settled on her (*In re Butlin's Trusts*, W. N. 1870, 251; 23 L. T. N.S. 523; 19 W. R. 241). Not where woman a ward of Court.

(k) As to what is meant by "public stocks and funds," see Davidson's 'Precedents and Forms in Conveyancing,' Vol. III. pt. 1, p. 31, 3rd Ed. By the Metropolitan Board of Works (Loans) Act, 1871 (34 & 35 Vict. c. 47, s. 14), this section is, as regards the Governor and Company of the Bank of England, extended and made applicable to Metropolitan Consolidated Stock. Public stocks and funds.
Metropolitan Consolidated Stock.

(l) *Semble*, this section does not apply to trust property at all, and, under it, the woman cannot require stock to be placed not only in her own name but in the names of other persons as well (per the M. R. in *Howard v. Bank of England*, L. R. 19 Eq. 299; 23 W. R. 303; 44 L. J. Ch. 329; 31 L. T. N.S. 871). *Semble*, no transfer under this section to a joint account.

(m) See note (h), sect. 2.

(n) But the Act does not empower a married woman entitled to a sum of stock for her separate use to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under this section, in her name as a married woman entitled for her separate use. A sum of consols was standing in the name of three persons, one of whom was a married woman who had been deserted by her husband, and was entitled beneficially to the stock under section 7 of this Act. Those persons applied to the Bank of England to be permitted to transfer the stock without the concurrence of the husband of the married woman: but, the Bank refusing, it was held that the Bank could not be compelled to permit such a transfer (*Howard v. Bank of England*, *ubi supra*). No transfer by wife without husband, unless stock first placed in her name under this section.

(o) See note (i), sect. 2.

IV. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company that any fully paid-up shares, or any debenture or debenture stock, or any stock of such company, to the holding of As to a married woman's property in a joint-stock company.

which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use (*p*), and it shall be the duty (*q*) of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed (*r*) to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent (*s*), the Court may, upon an application under section nine of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

Fraud on marital rights.

(*p*) As to fraud on marital rights, in the registration of shares under this section, see note (*j*) to sect. 3.

Married woman a shareholder at law.

A married woman, or a woman about to be married, may now claim as of right to be the registered legal owner of stock and shares *to which she is entitled*, and to which no liability attaches, in any incorporated or joint-stock company, as her separate property.

The section imperative.

(*q*) The section is imperative, and on an application under the section the company must investigate the title to the shares, and, unless they can show a flaw in the title, may be compelled by *mandamus* to register (*Reg. v. Carnatic Railway Company*, L. R. 8 Q. B. 299; 21 W. R. 621; 42 L. J. Q. B. 169; 28 L. T. 413). As to the married woman's rights and liabilities in respect of such property see note (*e*), sect. 1. It is to be observed that the present section does not in terms provide for the compulsory registration of shares which a married woman *is about to acquire* to her separate

use. Compare and distinguish in this respect the previous section. But, it is conceived, that a contract for the purchase of shares, conferring an equitable title, would be sufficient, since the section pre-supposes the want of a legal title in the applicant, which it is the object of the section to supply.

Even before the passing of the Act, there was nothing in the nature of a joint-stock company which, apart from special prohibitory clauses, prevented a married woman, possessed of separate estate, from contracting in equity to take, and from holding in her own name, stock or shares of any description as her separate property (*Mrs. Matthewman's Case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90; 15 W. R. 146; *Butler v. Cumpston*, L. R. 7 Eq. 16; 38 L. J. Ch. 35; 17 W. R. 24). The Courts will therefore protect property of this nature, even where the legal title cannot be obtained under the present section. If such property represent investments of earnings under sect. 1, it will apparently possess the additional incidents of statutory separate estate. A married woman may be made a contributory in respect of her separate estate (*Mrs. Matthewman's Case*, *supra*): but the provisions of sect. 4 seem to contemplate registration in respect only of *fully paid-up* shares.

Married woman a shareholder independently of the Act.

Married woman a contributory.

(r) See note (h) to sect. 2.

(s) See note (i) to sect. 2.

V. Any married woman, or any woman about to be married (t), may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit-building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the

As to a married woman's property in a society.

name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty (u) of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed (v) to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband, without his consent (w), the Court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

(t) As to fraud on marital rights, see note (j), sect. 3.

Operation of
the section.

(u) The section is imperative, and renders it compulsory on societies to register, *Reg. v. Carnatic Railway Company*, note (q), sect. 4. The application of this section is restricted to the case of shares, benefits, and debentures, to which a woman, married or about to marry, is entitled (see note (q), sect. 4), and to which no liability is attached. (See Davis's 'Building and Freehold Land Societies,' 2nd Ed., p. 144.) The ordinary shares in such societies, which involve periodic payments, will therefore not come within its scope. It will, however, probably afford to married women an accessible mode of investment for small sums, now that it has been decided that a rule authorizing societies, constituted under 6 & 7 Will. 4, c. 32, to borrow within reasonable limits is not illegal under the statute (*Laing v. Reed*, L. R. 5 Ch. 4; 18 W. R. 76; 39 L. J. Ch. 1). As to the incidents of such shares and debentures, when entered as separate property under the Act, see note (e) to sect. 1.

What shares,
benefits, and
debentures are
within the
section.

Freehold land
societies.

It is to be observed, that shares in freehold land societies are not

within the section. The cases show, that societies having for their object the acquisition of land, cannot be legally constituted under any of the building or benefit-societies' Acts. See *Grimes v. Harrison*, 26 Beav. 435; *Hughes v. Layton*, 10 Jur. N.S. Q. B. 513, S. C. *nom. Hughes v. D'Eyncourt*, 12 W. R. 408.

As regards shares and interests, which, whether as involving future liabilities, or for other reasons, do not come within the section, it is submitted that the principle of *Mrs. Matthewman's Case* (L. R. 3 Eq. 781; 36 L. J. Ch. 90; 15 W. R. 146) must be held to apply, and that married women possessed of separate estate may contract to take such shares and interests, and may acquire a good equitable title thereto, as their separate property. And see note (g), sect. 4.

(v) See note (h) to sect. 2.

(w) See note (i) to sect. 2.

VI. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks, or moneys invested in the funds, or in shares, or stock of any company, shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors (x), and any moneys so deposited or invested, may be followed as if this Act had not passed.

(x) The power given to married women by the preceding sections of holding separate property free from the rights and control of their husbands affords to dishonest debtors facilities for making fraudulent investments in their wives' names. The present section reserves the rights of creditors against property so invested and settled, and enables them to follow it as if this Act had not passed. In such cases the transfer, though fraudulent against creditors, will be binding on the husband. See *Groves v. Groves*, 3 Yo. & Jer. 163.

The rights of creditors will, however, it is conceived, by analogy Under what circumstances.

Settlement for
value void
where actual
fraud.

Voluntary,
where con-
structive
fraud.

to the law of fraudulent settlements, vary according to circumstances. Thus, if a settlement has been made on the wife, in contemplation of marriage, or for other valuable consideration, the onus is on the creditors to prove actual intention to defraud. (*Holmes v. Penney*, 3 K. & J. 90.) The consideration of marriage will not prevail, if part of a scheme to defraud creditors (*Colombine v. Penhall*, 1 Sm. & Giff. 228; *Bulmer v. Hunter*, L. R. 8 Eq. 46; 35 L. J. Ch. 543). If, on the other hand, the settlement is voluntary, it is sufficient to prove constructive fraud, which will be presumed from a variety of circumstances. Thus, where a settlor, solvent at the date of the settlement, was thereby left without funds sufficient immediately to pay his debts, and subsequently it proved that a creditor was in fact hindered and delayed in recovering his debt, the settlement was set aside as fraudulent and void (*Freeman v. Pope*, L. R. 5 Ch. 538). And a subsequent creditor, who can prove the existence of a debt incurred prior to the settlement, may procure the settlement to be set aside, and rank as a creditor against the settled property (*ibid.*). And see *Jenkyn v. Vaughan*, 3 Drew. 419; notes to *Twyne's Case*, 1 Sm. L. C. 10, *et seq.*, 6th Ed.; notes to *Ellison v. Ellison*, 1 Wh. & Ta. L. C. 245, *et seq.*, 4th Ed.; Davidson's 'Precedents and Forms in Conveyancing,' vol. III. pt. 1, 3rd Ed., p. 675; Bankruptcy Act, 1869, sect. 91.

As to onus of proof, see note (h), sect. 2.

Personal prop-
erty not ex-
ceeding 200*l.*
coming to a
married
woman to be
her own (*sic*).

VII. Where any woman married after the passing of this Act shall during her marriage become entitled (y) to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will (z), such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same (a).

Section does

(y) The benefit of this section is restricted to women married

after the passing of the Act, who have not by settlement contracted themselves out of its provisions. It differs in its language from the following section, the application of which is not in terms limited to interests accruing to the wife *during coverture*. See note (a) sect. 8. The wording, of the section suggests a doubt whether sums of money under 200*l.* which may have vested subject to a contingency or in remainder under any deed or will prior to marriage, but fall *into possession* during the coverture, are within the Act. It appears, however, that "entitled" must be construed as "entitled in possession:" see *Lane v. Oakes*, 22 W. R. 709, 30 L. T. 726, where a reversionary interest in a fund, vested in a woman prior to, but which fell into possession after, marriage was held to be within the Act. In that case, the fund having been paid out of Court, on the joint petition of the husband and wife, to the husband in right of his wife was held to have lost its character of separate estate, and to have been validly attached by a creditor of the husband. Compare *Johnson v. Lander* (L. R. 7 Eq. 228; 17 W. R. 272), decided on the 25th section of the Divorce Act.

(2) The marginal note to this section is inaccurate. The character of separate estate is now impressed upon all personalty, without restriction as to its nature or value, to which a woman becomes entitled during coverture as next of kin or one of the next of kin of an intestate. Where, however, personal property is acquired by deed or will, sums of money not exceeding 200*l.* will alone come within the section. It appears, however, by analogy to the cases decided on covenants to settle after-acquired property, that where more than one legacy or a legacy and share of residue, severally within, but in the aggregate exceeding, the amount of 200*l.*, are bequeathed by the same will, that the benefit of the section may be claimed in respect of each several amount (*Re Middleton's Will*, 16 W. R. 1107); and as to interests accruing under deeds, see *Bower v. Smith*, L. R. 11 Eq. 279. As to what is held to pass under a gift of "money," see *Lowe v. Thomas*, 5 De G. M. & G. 315, and 1 Jarm. on Wills, 790, note (k), 3rd Ed.

With the above exceptions, an express limitation to separate use will still be necessary, where it is intended to secure personal pro-

not apply to women married before the Act.

"Entitled" means "entitled in possession."

A fund within the section, if paid to the husband with the consent of the wife, ceases to be separate estate.

Share under Statutes of Distribution is separate property.

Secus—personality coming under deed or will, unless sum of money under 200*l.*

Limitation to separate

use still necessary, in case of leaseholds, stocks, and shares.

Gifts of jewellery.

Husband's rights in deceased wife's personality.

Payment out of Court to married woman.

Restriction on anticipation, when destroyed.

Freehold property coming to a married woman, to be her own (*sic*).

erty by deed or will to married women, as the section does not affect personalty vested in possession before marriage, or leaseholds, stock, shares, &c., coming to women by deed or will after marriage. Such personalty, in default of the limitation to separate use, will still vest in the husband in his marital right, and the wife will be left to claim her equity to a settlement as before the Act. Neither does it appear that paraphernalia, or gifts of jewellery or trinkets made to the wife, are within the section. The latter class of property, however, is usually held separate property in equity. (*Graham v. Londonderry*, 3 Atk. 394.) As to trust estates, see note (c) sect. 8.

Unless the property be reduced into possession by the wife, the quality of separate estate ceases at her death, and the husband as her administrator becomes entitled thereto, subject to the payment of her debts. She may, however, dispose of outstanding or reversionary separate property during her lifetime or by will (*Sturgis v. Corp*, 13 Ves. 190; *Lechmere v. Brotheridge*, 32 Beav. 353, 369; 11 W. R. 814).

(a) Payment of a fund in Court may, it is conceived, within the limits of this section, now be made to a married woman on her sole receipt, without any other inquiry than as to the existence of a settlement: the saving in favour of the trusts of any settlement affecting the fund will keep alive the restriction against anticipation, which has been held to be destroyed in the case of a woman who had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, by which Act the power of giving receipts is left unqualified and absolute (*Cooke v. Fuller*, 26 Beav. 99), and in the case of a woman judicially separated (see *Munt v. Glynes*, 20 W. R. 823; 41 L. J. Ch. 639).

VIII. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate (b), the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate

use (c), and her receipts alone shall be a good discharge for the same.

(b) The marginal note to this section is again misleading. In the first place the section applies to copyhold and customaryhold property as well as to freeholds; in the next place it does not extend to lands acquired by conveyance, devise, or otherwise than by descent; the limitation for separate use is therefore necessary in all cases, as before the Act.

Its application is not in terms restricted to lands descended during the coverture. "It seems doubtful whether the section extends to real estate, which after the passing of the Act descends upon a woman who is at the time unmarried, but who subsequently marries." (Dart's 'Vendors and Purchasers,' 5th Ed., p. 12); but, at all events, a woman married after the passing of the Act, will be entitled to the rents and profits of real estate, to which she may become entitled during coverture as heiress or co-heiress of an intestate, to her separate use for life, subject to the trusts of any settlement affecting the same, and will have the same proprietary rights over such separate estate as a *feme sole*. The Act does not, however, affect her rights over the fee, but leaves her, as before, unable to deal with it except under the provisions of the Act for the Abolition of Fines and Recoveries (*Lechmere v. Brotheridge*, 32 Beav. 353; 11 W. R. 814). On the other hand, since the character of separate estate ceases on her death, the reversion in fee will not be subject to her debts. For the same reason she cannot dispose of it by will, nor will her husband's title as tenant by the curtesy be excluded. Subject to the tenancy by the curtesy, where existent, the fee will descend to her heir (*Morgan v. Morgan*, 5 Mad. 408; *Follet v. Tyrer*, 14 Sim. 125).

Arrears of rent will, on the death of the wife without disposing thereof during her lifetime or by will, form part of her separate personal estate, and be subject as such, in the hands of her administrator, to the payment of her debts (*Hearle v. Greenbank*, 3 Atk. 718). Being separate estate, the arrears may of course be alienated or invested by the wife.

(c) The terms of this section, no less than the general scope and

Section applies to all real property descended

Rents and profits to separate use for life.

Power to dispose of the fee.

Tenancy by the curtesy.

Arrears of rent.

Trust estates.

object of the Act, appear to indicate that the latter is designed to protect beneficial interests alone of married women from marital control, and that it is not intended to apply to estates and interests vested in them in a fiduciary capacity; and such is the view of the present Master of the Rolls, at all events as regards sect. 3 (see *Howard v. Bank of England*, cited in note (1) sect. 3). It is conceived, therefore, that a married woman, acting as trustee or executrix, is still subject to the same incapacities as heretofore. Compare and distinguish the language of 20 & 21 Vict. c. 85, s. 21, amended by 21 & 22 Vict. c. 108, s. 7,* which expressly provides for the case of trust estates. And see the observations of Wood, V.C., in *Bathe v. Bank of England*, 4 K. & J. 564.

How questions
as to owner-
ship of prop-
erty to be
settled.

IX. In any question between husband and wife as to property declared by this Act to be the separate property of the wife (*d*), either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property)† the Judge of the County Court of the district in which either party resides, and thereupon the Judge may make such order, direct such inquiry, and award such costs as he shall think fit; provided that any order made by such Judge shall be subject to appeal in the same manner as the order of the same Judge made in a pending suit or on an equitable plaint would have been, and the Judge may, if either party so require, hear the application in his private room (*e*).

† *Sic*.

Section does
not extend to

(*d*) Questions arising between husband and wife in relation to separate property may now be decided in a summary way under

* See Appendix, pp. 69, 71.

this section. A distinction must, however, as it appears, be drawn between "property declared by this Act to be the separate property of the wife" and those classes of separate property which, not coming within the scope of the Act, owe their creation to Courts of Equity alone. Property settled by the husband or third parties on the wife to her separate use in the ordinary way will apparently fall under the latter head. With regard to the former class of statutory separate property, proceedings may now be taken by either husband or wife in a summary way by summons or motion without writ issued, in the Chancery Division of the High Court or in the County Courts, irrespective of the value of the property involved. But the section is not imperative; see *ante*, p. 21.

Under its protective jurisdiction the Court of Chancery will restrain a husband by injunction from interfering with his wife's separate business, and, under special circumstances, from entering her house, though the relief given may in effect operate as a divorce *à mensâ et thoro*. (*Green v. Green*, 5 Hare, 400 n.; *Wood v. Wood*, 19 W. R. 1049.)

As to questions in relation to property appropriated or settled to the wife's separate use under the Act, in fraud of her husband's marital rights, see note (j), sect. 3. And where, after marriage, moneys of the husband have been similarly appropriated without his consent, such moneys and all investments thereof will remain in equity his property (*Barrack v. McCulloch*, 3 K. & J. 114; 5 W. R. 38). The savings of the wife, from an allowance made to her by her husband for household purposes, cannot without his consent be invested to her separate use (*ibid.*); unless she be living separate from him (*Brooke v. Brooke*, 25 Beav. 342). And see note (i), sect. 2. As to the onus of proof in such cases see note (h), sect. 2; and under the old law, *Grant v. Grant*, 13 W. R. 1057.

Where, on the other hand, separate property of the wife has come into the possession of the husband, the wife being in relation to such separate property in the position of a *feme sole*, will be bound by her dealings relating thereto (*Pawlet v. Delaval*, 2 Ves. 663); and will obtain relief only on proof of fraud, duress, or the like on the part of the husband (*Ibid.*; *Essex v. Atkins*, 14 Ves. 542). But the course of dealing must be distinctly proved, and the intention of the

"equitable" separate property.

Injunction against husband's interference in separate business.

Fraud on husband.

Savings from allowance.

Relief in cases of fraud or duress.

Evidence of gift.

wife to make over her property to her husband be clear, as the Court will not raise a presumption against her (*Rich v. Cockell*, 9 Ves. 369). On the other hand, there must be corroborative evidence to establish a gift from husband to wife (*Grant v. Grant*, 13 W. R. 1057).

Acquiescence.

Tacit acquiescence, however, in the receipt of income of separate estate by the husband will disentitle the wife to an account against him (*Caton v. Rideout*, 1 Mac. & G. 599; *Payne v. Little*, 26 Beav. 1); *secus* where the wife has not consented (*Parker v. Brooke*, 9 Ves. 583) or where the husband has received the income to her use (*Darkin v. Darkin*, 17 Beav. 578). And the wife may sue her husband, or prove against his estate after his death, for sums advanced to him out of her separate estate by way of loan (*Woodward v. Woodward*, 3 De G. J. & S. 672; 11 W. R. 1007).

Loan to husband.

Hearing in *camera*.

(e) A request by one party is sufficient to justify a judge in hearing privately matters brought before him under this section; but, for the ordinary practice as to hearings *in camera*, see *Andrew v. Raeburn*, L. R. 9 Ch. 522; *Nagle-Gillman v. Christopher*, L. R. 4 C. D. 173, 46 L. J. Ch. 60.

Married woman may effect policy of insurance.

X. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use (f), and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insurance of a husband for benefit of his wife.

A policy of insurance effected by any married man (g) on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed (h), and shall not, so long as any object of the trust remains (i), be subject to the control of the husband or to his

creditors, or form part of his estate (j). When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the Judge of the County Court of the district, or in Ireland by the Chairman of the Civil Bill Court of the division of the county in which the insurance office is situated (k), and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

(f) Insurances by married women, if not altogether unknown, Insurances by wife.
were previously to the passing of this Act rarely effected, owing to the incapacity of the wife to contract, except as the agent of her husband, and subject to his right to adopt her contracts for his own advantage. (As to a married woman's power to contract, see note (i) to sect. 11.) A married woman will now be able to insure her own or her husband's life, and thereby to secure a fund to her separate use, which she may dispose of by will or otherwise at her sole discretion. Where premiums have been paid out of moneys of the husband without his consent, he will probably be held to have a lien in equity on the policy moneys to the extent of such premiums. Premiums paid out of moneys of husband.
See *Norris v. Caledonian Insurance Company*, L. R. 8 Eq. 127. On the death of the wife, without having made any disposition of a fund insured on her life, the husband, as her administrator, will become entitled thereto, subject to the payment of her debts. As to the insurable interest of the wife in her husband's life, see *Reed v. Royal Exchange Assurance Company*, Peake's Add. Ca. 70.

(g) A husband, who, before the passing of this Act, had insured

his life and paid one premium on the insurance, after the passing of the Act gave up the policy and received a policy at the same premium for a sum payable to the separate use of his wife, if she survived him, and to him if he survived her: *held*, under the circumstances, that the policy must be taken as effected under the Act (*Holt v. Everall*, L. R. 2 Ch. Div. 266).

Power of Court to declare rights of wife and children.

(h) Where the interest to be taken by the wife and children is not expressed upon the face of the policy, the Court will, on an application under the subsequent part of this section for an appointment of trustees to receive the policy moneys, declare the rights and interests therein of the wife and children; see *In re Mellor's Policy Trusts*, L. R. 6 Ch. Div. 127, where *Malins*, V.C., ordered the fund to be settled upon the usual trusts of a settlement.

Inalienability.

(i) The continuance of an object of the trust would probably be held to include possibility of issue. Therefore, a policy expressed to be for the benefit of children will be absolutely inalienable, so long as there are infant children, or the possibility of issue, of the marriage.

What interest trustee in bankruptcy may have in policy effected under Act.

(j) This section modifies the 91st sect. of the Bankruptcy Act, 1869, relative to the bankruptcy of a trading settlor within two years after the date of the settlement. In such a case the most the trustee in the bankruptcy could claim would be to have paid to him out of the principal moneys assured the premiums paid by the husband in fraud of his creditors; subject to that, he would have no interest in such moneys, the same being indefeasibly settled for the benefit of the persons named on the face of the policy (*Holt v. Everall*, L. R. 2 Ch. Div. 266).

(k) The application to the Court should be by petition. See *In re Mellor's Policy Trusts*, *ubi supra*.

Married women may maintain an action.

XI. A married woman may maintain an action in her own name (l) for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her

after marriage as her separate property (*m*), and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman (*n*); and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property (*o*).

(*l*) This section effects an important change in the status of married women. Before the Act a *feme covert*, save in certain exceptional cases, as where the husband was a convict or an outlaw, was not recognised as having any personal existence at law apart from her husband; and in equity only if, and so far as, she was possessed of separate property; a qualification which it lay upon her to establish, before she could obtain a hearing. See *Barrack v. M'Culloch*, 3 K. & J. 119, 120; 5 W. R. 38. Now the onus is shifted, and an allegation by the wife that the property is her separate property is sufficient to give the Courts jurisdiction, and to make a *prima facie* case. Personal status of married women at law. Onus of proof.

Further, where a married woman claims to be possessed of separate property made such by the Act (see note (*d*) to sect. 9), or of property which belonged to her *before marriage*, which her husband by writing under his hand has agreed shall belong to her *after marriage* as her separate property, she has an independent personal status, so far as is necessary for the beneficial enjoyment and protection of such property; and may pursue all remedies civil and criminal in relation thereto in her own name without necessarily bringing her husband before the Court. Not only does the section give a right of action in cases directly involving the recovery or protection of separate property, but it has been decided that it Civil and criminal remedies for recovery or protection of separate property. Breach of contract.

extends to cases of breach of contract in relation to a separate business.

A married woman, carrying on a separate business, may sue her bankers for a breach of contract.

In the recent case of *Summers v. The City Bank* (L. R. 9 C. P. 580, 43 L. J. C. P. 261, 31 L. T. N.S. 268), a married woman, carrying on business as a sole trader, and having, as such, a banking account, sued her bankers for breach of contract, and it was held that the action lay. The facts of the case, which was heard on demurrer, sufficiently appear from the judgment of *Coleridge*, C.J., which was as follows:—"The question raised in this case is, whether a married woman can, under the words of the 11th section, maintain an action for breach of contract against her bankers. The declaration against the defendants contained three counts: first, for not presenting for payment a bill of exchange deposited with them for that purpose; secondly, for not giving notice to the plaintiff of the dishonour of a bill of exchange intrusted to them; and thirdly, for dishonouring a cheque drawn by the plaintiff upon the defendants, the defendants having at the time funds of the plaintiff to meet it. The defendants pleaded that the plaintiff was a married woman. The plaintiff replied that the cause of action arose exclusively from earnings, money, chattels and property within the meaning of the Married Women's Property Act, 1870, and that the defendants knew, when they accepted her banking account, that she was a married woman, carrying on her business separately from her husband. To this replication the defendants demurred. We are of opinion that the replication is good. The words of the section are very wide, and provide for two states of things. By the first portion of the section, the married woman may 'maintain an action' for the recovery of wages, earnings, &c., and by the second portion of the section she is to have 'the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, &c., as if such wages, earnings, &c., belonged to her as an unmarried woman.' The question is perhaps not precisely the same on all the three counts. But, to take the third count first, it is plain that this section of the Act will become almost useless, if a married woman, otherwise within its provisions, cannot maintain an action against her bankers for dishonouring her cheque.

"It does not necessarily follow, because a married woman may sue her bankers for dishonouring her cheque, that the general proposition is true without qualification, that she can maintain an action for damages for breach of contract. The relation of banker and customer is a peculiar one. It is that of debtor and creditor with a custom superadded (*Foley v. Hill*, 2 H. L. Ca. 28), and it seems perfectly clear that, as far as the count for dishonouring the cheque is concerned, the plaintiff is seeking a remedy for the protection of her earnings, within the meaning of the 11th section. The first and second counts undoubtedly raise a somewhat broader question, as they are founded upon a contract of agency. But we think that the words of the 11th section to which we have referred are sufficient to cover this state of circumstances also. To hold otherwise would be in effect to say, that a married woman could not safely have any of her earnings paid to her by bills of exchange, for that she has no protection against the negligence of the banker to whom she entrusts them.

Married woman's power to contract and to sue for breach.

"Our decision in favour of the plaintiff under these circumstances must not be taken to affirm, nor will it affirm, the general proposition that under this Act, and without reference to particular circumstances, a married woman can contract." On this point the M.R. has said: "It appears to me that the Act gives no power to contract to a married woman which she did not possess before. It does make certain property property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of Equity, and it superadds to that certain remedies in a Court of Law which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the Act makes no alteration in the position of the married woman (*Howard v. Bank of England*, L. R. 19 Eq. 301; 23 W. R. 303; 44 L. J. Ch. 329; 31 L. T. N.S. 871.) It is conceived that the principle is, that when a contract is entered into by a married woman, personally or by her agent, within the legitimate scope of the separate business, or necessary and proper, according to the exigencies of every-day life, for the protection and security of her separate property, she is enabled to enforce such

contracts, and has her remedy for the breach of them under this section.

Can she sue for libel on her in her trade?

In the course of the argument of *Summers v. City Bank* (*ubi supra*), Brett, L.J., suggested that a married woman, trading separately under the Act, might sue for a libel or slander on her in her trade, since she would be suing for the protection of her trade. The point, if it came up for argument, would in all probability be decided in her favour, by analogy to the recent decision in *Ramsden v. Brearley* (L. R. 10 Q. B. 147; 44 L. J. Q. B. 46), which establishes that a wife who has been deserted by her husband and obtained a protection order under 20 & 21 Vict. c. 85, s. 21, can sue in tort (here for libel) in her own name.

Next friend.

It is presumed that in all cases within the section the wife may now sue in equity without a next friend. It may, however, be a question whether the defendant will not then be entitled to apply for security for costs (see *Picard v. Hine*, L. R. 5 Ch. 275). For the same reason, in like cases, it appears that an action by the wife will not be open to objection for lack of parties where the husband is not before the Court; yet circumstances may render it necessary or expedient that he should as formerly be made a defendant. In *Howard v. Bank of England* (*ubi supra*) the married woman was described as "suing as a *feme sole* by virtue of the provisions contained in the "Married Women's Property Act, 1870," and an objection was taken on the ground of the husband not being a party. The objection, however, does not appear to have been pressed, and no notice is taken of it in the judgment.

Whether husband a party.

Parties under the New Practice.

By Order XVI., r. 8, of the Rules of the Supreme Court, 1875, married women may sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77). They may also, *by the leave of the Court or a Judge*, sue without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require. And see r. 13 of the same Order, as to the power of the Court to rectify the record, where parties are wrongly joined or omitted.

Married woman a defendant.

It will be observed that though a married woman is entitled to a limited extent to maintain an action, there is nothing apparently

in the Act, with the exception of the cases provided for by sects. 12, 13, and 14, to alter the previous practice, where she is made a defendant.* But, by the rules of the Supreme Court, 1875, Order XVI., r. 8, married women may, *by the leave of the Court or a Judge*, defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require. See Morgan's Chancery Acts and Orders, 5th Ed., p. 478. It has been decided that it is unnecessary to make trustees of the wife's separate property co-defendants with her (*Davies v. Jenkins*, L. R. 6 Ch. Div. 728).

As to the form of a judgment against the separate estate, see form of judgment. *Picard v. Hine*, L. R. 5 Ch. 274; App. p. 78; *Davies v. Jenkins*, *ubi ment. supra*.

The cases leave it somewhat doubtful whether an injunction will be granted against a married woman. In *Warne v. Routledge* (L. R. 18 Eq. 497; 22 W. R. 750; 43 L. J. Ch. 604), the present Master of the Rolls declined to grant an injunction against an authoress to restrain the publication of a second edition of a book, the copyright of which she claimed as her separate property, on the ground of her incapacity to bind herself by contract; the mere power of contracting which a married woman has in respect of such property being not a power of entering into a personal contract in the sense of binding her personally, but a power of contracting so as to bind her property.† Again in an action (*National Provincial Bank of England v. Thomas*, 24 W. R. 1013) to obtain payment of the debt of a married woman out of her separate property, an application before the hearing for an injunction to restrain the married woman from alienating her separate property was refused by the same learned judge,‡ because the circumstance that her separate estate is liable for her general engagements does not give her creditors any charge upon the separate property, their right only being to be paid out of it by obtaining execution. On the

* Distinguish 20 & 21 Vict. c. 85, ss. 21, 26, App. pp. 69, 70.

† Therefore, *semble*, a married woman may so deal with copyright to which she is entitled for her separate use as to prevent the *assigns* of that copyright from breaking her contract (*ibid.*).

‡ A notice of motion for a receiver would be open to the same objection (*ibid.*). See, however, *Richardson v. De Held*, 1 N. R. 5.

other hand, in the case of *Swanborough v. Henderson* (Sept. 9, 1874, Hall, V.C.), in which an interim injunction had been granted against an actress who, contrary to the terms of her contract with the plaintiff, had engaged to play at a rival theatre, the learned judge stated, on motion to continue the injunction, that he had no doubt as to the jurisdiction, or the right of the plaintiff to the relief sought by the bill: but, as the injunction was by consent dissolved, and a reference taken as to the matters in question, the case can scarcely be considered as possessing the full weight of a judicial decision on the point under consideration. Both *Warne v. Routledge* and *Swanborough v. Henderson* were argued, and treated by the Court, as falling under the 1st section of the "Married Women's Property Act, 1870." See also *Hope v. Carnegie* (L. R. 7 Eq. 261), where, on motion to commit the wife for breach of an injunction, which had been granted against husband and wife, it was said by *Stuart*, V.C., that "wherever the separate property of the wife is concerned, or the separate acts of the wife are disowned by the husband, this Court has never wanted the means of enforcing against the wife, as easily as against the husband, its orders and decrees."

Can a married woman be made bankrupt?

In former editions an opinion was expressed that married women, if possessed of separate property, would now be liable to be made bankrupts, since in certain cases they are recognised at law as competent to contract, and may sue and be sued, apart from their husbands. The point has recently arisen in *Re Heneage* (L. R. 9 Ch. 307; 22 W. R. 425; 43 L. J. Ch. 85), where a married woman had been sued under sect. 12, and judgment recovered, and subsequently a debtor summons was served upon her. There the full Court of Appeal decided that she could not, under the circumstances, be made a bankrupt. It was in evidence that she had no separate property. *Mellish*, L.J., however, expressed an opinion that the decision might have been different, had there been evidence of the existence of separate estate. Notwithstanding certain *dicta* of the Lord Chancellor and *James*, L.J., that the Act had not effected such a change in the *status* of married women as to bring them under the operation of the bankruptcy laws, it is conceived that the decision is an authority only for the proposition that a married woman cannot be made bankrupt where she has no separate property, and

that the further question indicated by *Mellish*, L.J., must be considered as still undecided. In one very recent case (see and consider *Day v. Freund*, 35 L. T. N.S. 551) it appears that a married woman having some separate property has actually been made a bankrupt, though the case in question is no authority for the legality of the proceedings. The reason formerly given for the immunity of a married woman, namely, that she could not be sued at law (2 Bright's H. & W. 301; *Marshall v. Rutton*, 8 T. R. 545) no longer exists. See also *Ex parte Carrington* (1 Atk. 206), where a *feme covert* trading by the custom of the City of London, and *Ex parte Franks* (7 Bing. 762), where the wife of a convict, were adjudicated bankrupts.

The Act does not affect the disability, to which women have hitherto been subject, with respect to the franchise (*The Queen v. Harrauld*, L. R. 7 Q. B. 361).

(m) It is to be observed that "property belonging to the wife before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property," is not classed with, but rather is distinguished from, "statutory" separate property. Property of the former kind (which apparently includes the interest reserved to the wife under an ordinary ante-nuptial settlement of her property, or under a settlement executed in pursuance of ante-nuptial articles) has none of the special incidents of "statutory" separate property except—what is here expressly given—power to the wife to maintain an action in her own name for the recovery of such property, and such remedies for the protection thereof as she would have enjoyed if a *feme sole*. See *ante*, p. 21.

(n) It is conceived that there is nothing in the statute to vary the rule by which communications between husband and wife, during the marriage, are held privileged and inadmissible in evidence, such privilege being based on general grounds of public policy. See Taylor on Evidence, 6th Ed. p. 810, and 16 & 17 Vict. c. 83, s. 3.

The language of the section is apparently wide enough to enable a wife to proceed criminally against her husband, where necessary for the protection and security of her separate property. It may, however, be contended that the Legislature in giving a civil remedy (sect. 9) in questions between husband and wife, has indicated an

Married women's property settled on marriage.

Privilege between husband and wife.

Criminal proceedings against husband.

intention that that remedy and no other shall be available in questions arising under the Act. In any event it is conceived that there would be considerable practical difficulty in proving the *animus furandi*, if the husband were prosecuted for larceny of his wife's separate chattels.

Whether
coverture a
disability
within Statute
of Limitations.

The wife having now a personal right of action in respect of her statutory separate estate, coverture will probably in such cases cease to be a disability within the meaning of the Statutes of Limitation.

Husband
indorsing his
wife's note of
hand.

Query—Whether the statutory right of action here given may not affect the husband's title to his wife's negotiable securities, and whether an indorsee from him of a bill or note made payable to his wife, will not now be held to be put upon inquiry as to the nature of the wife's interest. See and distinguish *Dawson v. Prince* (2 De G. & J. 41), where an action had been brought on a bill of exchange payable to the order of D., a married woman, by P., the indorsee for value from D.'s husband, who had forged his wife's name on the back of the bill, and then indorsed his own. D. then filed a bill to restrain the action, but it was dismissed with costs, on the ground that no indorsement by the wife was necessary, and P. took a legal title under the husband's indorsement, and had no notice of D.'s interest. And *query*—Is not the doctrine affected which was laid down in *White v. Cohen* (1 Drew. 312), where, on a bill by a married woman to restrain a nuisance affecting her separate property, her husband not being a co-plaintiff, a doubt was thrown out whether such a bill could be maintained, on the ground of her personal incapacity to maintain an action at law.

Injunction at
suit of wife. #

(o) See note (h) to sect. 2.

Husband not to
be liable on his
wife's con-
tracts before
marriage.

XII. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage (p), but the wife shall be liable to be sued for, and any property belonging to her for her separate use (q) shall be liable to satisfy, such debts, as if she had continued unmarried.

(p) This section, so far as it relieves the husband from liability, has been repealed by 37 & 38 Vict. c. 50, s. 1. That Act is not retrospective, and a husband married after the 9th of August, 1870, and before the 30th of July, 1874 (the date of the passing of the Amendment Act) is released at law from all liability on the ground of coverture to pay his wife's debts contracted when sole, irrespective of the question whether or not he has become entitled to any property in right of his wife. But in equity, where marriage has purposely been made a means of defrauding creditors, as where a woman, having contracted debts, marries without reserving to herself separate property, and her property thereupon becomes vested in her husband in his marital right, it is conceived that the creditors of the wife may, by analogy to the case of a fraudulent settlement, have a remedy against the husband, to the extent of any property which has come to him in right of his wife. Thus in *Colombine v. Penhall* (1 Sm. & Giff. 228), *Stuart, V.C.*, lays down the principle that "where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement" (page 256); see also *Bulmer v. Hunter* (L. R. 8 Eq. 46; 38 L. J. Ch. 543). But in these cases clear evidence would be required of the intention to defraud.

Husband not liable for wife's ante-nuptial debts.

Whether when marriage a fraud on creditors—query.

The section does not affect the husband's liability for his wife's torts or breaches of contract before marriage, for which, as formerly, he remains personally liable: see and distinguish 37 & 38 Vict. c. 50 (Amendment Act), s. 2, as to the limited liability of husbands married after the passing of that Act; and see *ante*, p. 13.

Husband liable for wife's torts and breaches of contract.

(q) The creditor's remedy extends, under this section, not only to separate property of the wife made such by the Act, but to her equitable separate property generally. Thus in *Sanger v. Sanger* (L. R. 11 Eq. 470; 19 W. R. 792; 40 L. J. Ch. 372), a stop order was granted on a settled fund, which had been paid into Court, in aid of a charging order made in an action, in which judgment had been entered up against a married woman, though the fund was subject to restraint against anticipation. See *ante*, p. 11.

All separate property liable under this section, though a restraint against anticipation.

Under the old practice, where husband and wife were sued Power to

commit where jointly for debts of the wife contracted before marriage, and judgment was obtained against them, the Court refused to discharge the wife from custody under a *ca. sa.*, unless it appeared that she had no separate property (*Ivens v. Butler*, 26 L. J. Q. B. 145; *Jay v. Amphlett*, 32 L. J. Ex. 176). But now by 32 & 33 Vict.

Under Debtors c. 62, s. 5 (2) (The Debtors Act, 1869), which applies to married women (*Dillon v. Cunningham*, L. R. 8 Ex. 23), it is enacted that subject to the exceptions specified in the 4th section, the jurisdiction to commit to prison "shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

Under Irish Debtors Act. In *Nagle v. O'Donnell* (Ir. R. 7 C. L. 79; 21 W. R. Dig. 143), an application to discharge from custody a married woman, arrested in execution on a judgment obtained under this section, was refused, though she had no separate property. The Irish Debtors Act (35 & 36 Vict. c. 57), which is in similar terms to the English Act, does not appear to have been cited in the case. See also *Beynon v. Jones*, 15 M. & W. 566; *Poole v. Canning*, L. R. 2 C. P. 241; *Dillon v. Cunningham*, *supra*, and note (a) to 37 & 38 Vict. c. 50, s. 4.

Married woman to be liable to the parish for the maintenance of her husband.

XIII. Where in England the husband of any woman having separate property (*r*) becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish (*s*). Where in Ireland relief is given

under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by such and the same actions and proceedings as money lent.

(r) The liability of a married woman is not in terms restricted to her statutory separate property.

(s) Under 31 & 32 Vict. c. 122, s. 33 ("The Poor Law Amendment Act, 1865"), when a married woman requires relief without her husband, the guardians or overseers, as the case may be, may apply to the justices in petty sessions for a summons against the husband, requiring him to show cause why an order should not be made upon him to maintain his wife: and thereupon the justices may make an order for the payment of such weekly or other sum by the husband, as may seem right. And, under 11 & 12 Vict. c. 43, s. 19, where an order requires payment of a sum of money, justices of the peace are empowered to issue a warrant of distress to levy the same, and in default may commit the person to prison on whom such order is made. Maintenance how enforced.

This section, it was held, gave no jurisdiction to the Court of Chancery, on dealing with a fund in Court, to stop the fund or pay it out subject to a claim of the guardians (*Elliott v. Hooper*, W. N. 1874, 57).

As to the probable effect of this section in raising the presumption of advancement to a husband where the wife has made investments in his name, see note (t) to sect. 14. Advancement to husband.

XIV. A married woman having separate property (t) shall be subject to all such liability for the maintenance of her children as a widow (u) is now by law subject to for the maintenance of her children: Provided always, that nothing in this Act shall relieve her husband from any Married woman to be liable to the parish for the maintenance of her children.

liability at present imposed upon him by law to maintain her children.

Maintenance
out of separate
property.

(*t*) The change in the law effected by this section, in making the wife liable, in a proper case, to maintain her children out of her separate estate must, it is submitted, produce a corresponding change in the practice of the Court in its protective jurisdiction over its infant wards. Hitherto, the wife being under no legal obligation to support her children during her husband's life, the Court has refused to order contribution towards their support from her separate estate, even in a case where the children were in the greatest destitution, and their mother had eloped from her husband (*Hodgens v. Hodgens*, 4 Cl. & Fin. 323, 373; and see notes to *Eyre v. Countess of Shaftesbury*, 2 Wh. & Tu. L. C. 645, 4th Ed.). However, even under this Act, the liability of a married woman having separate property to maintain her children is only such as a widow is subject to; and a widow appears to be under *no* such liability, where the children themselves possess property to be broken into (see *Douglas v. Andrews*, 12 Beav. 310). The effect of the section then seems to be that the separate property of the mother is only liable to the maintenance of the children where the property of the latter *and* of the father are inadequate.

Note, that the married woman's liability is not confined to *statutory* separate property.

Presumption of
advancement.

The effect of the section may likewise be, in certain cases where a married woman has out of her separate property made a purchase in the name of a child, to cause a presumption of advancement to arise. See and distinguish *Re De Visme*, 2 De G. J. & S. 17.

Investment in
names of hus-
band or
children.

The effect of this and the preceding section being to render the wife liable in certain events to maintain her husband and children, it will be inadvisable to make investments of her separate property in their names, whether jointly with her own or not, since if the wife die leaving any such nominees surviving, the property may, if the above view of the law be correct, pass to them as an advancement, and will not be subject to her disposition by will.

Once more the married woman's liability is not restricted to her statutory separate property.

(u) By 4 & 5 Will. 4, c. 76, s. 56, it is enacted, that "any relief given to or on account of any child or children under the age of sixteen of any widow shall be considered as given to such widow; provided always that nothing herein contained shall discharge the father and grandfather, mother and grandmother, of any poor child from their liability to relieve and maintain such poor child, in pursuance of the provisions of a certain Act of Parliament passed in the forty-third year of the reign of Her late Majesty Queen Elizabeth, intituled "An Act for the Relief of the Poor." See 4 Burn's J. P. 294 *et seq.*, ed. 1869. See also and consider the judgments in *Peters v. Cowie*, L. R. 2 Q. B. 131. Poor Law relief of children.

XV. This Act shall come into operation at the time of the passing of this Act (v). Commence-
ment of Act.

(v) This Act was passed on the 9th day of August, 1870.

XVI. This Act shall not extend to Scotland.

Act not to
extend to
Scotland.

XVII. This Act may be cited as the "Married Women's Property Act, 1870." Short title.

MARRIED WOMEN'S PROPERTY ACT (1870)
AMENDMENT ACT, 1874.

(37 & 38 VICT. CAP. 50.)

An Act to amend the Married Women's Property Act
(1870). [30th July, 1874.]

WHEREAS it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt (*w*). Husband and wife may be jointly sued for her debts before marriage.

(*w*) The object of the Amendment Act, which is not retrospective, is, as indicated in the preamble, to amend the law as to the recovery of debts incurred by the wife before marriage. By the 12th section Act not retrospective.

Husband's liability for wife's ante-nuptial debts.

of the Act of 1870 the husband was relieved from liability to pay these debts, though he might still, as before the Act, become entitled to property in right of his wife. He may now be sued jointly with his wife, and judgment be recovered against him to the extent of the assets specified in s. 5. As to the effect of a joint judgment against husband and wife, see note (a), sect. 4.

Extent to which husband liable.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage (x), be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned (y).

Husband liable for wife's debts, torts, and breaches of contract before marriage, but his liability limited to "assets."

(x) The exception created by the 12th section of the principal Act being now removed (see note (p), p. 54), the husband is, as formerly, liable to be sued jointly with his wife for her debts incurred, and torts or breaches of contract committed, before marriage. ('Bullen and Leake's Precedents,' 3rd Ed., pp. 171, 338.)

Plea of "no assets," or assets to an amount confessed.

(y) The effect of the present section is to limit the husband's liability to the extent of his assets as defined in section 5, and, where the issue has been raised by plea, to relieve him from a general personal responsibility in such actions as are mentioned in this section. In any such action the husband may now plead "no assets," or that he is liable only to an amount confessed; and thereupon may show in avoidance, or diminution *pro tanto*, of his

liability, the amount of any debts of his wife, which he has paid since his marriage, or of any judgment *bonâ fide* recovered against him under this Act. If no such plea is pleaded, he is to be deemed to have confessed his liability as regards assets, and cannot claim the benefit of the 3rd section.

The fact that, in an action against him by a creditor of his wife, he can escape liability by showing that he has already paid or had judgment recovered against him in respect of her debts to the extent of the assets he received with her clearly gives the husband the power of preferring one of his wife's creditors to another, in those cases in which the wife's indebtedness exceeds the amount of the assets specified in sect. 5.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife (z). If husband without assets he shall have judgment for costs.

(z) This section is ambiguously worded, and must apparently be read, "if it is found in such action, that the husband is *not* liable;" otherwise, though he has omitted to plead "no assets," he might, after having raised unsuccessfully other defences, claim his costs, on the ground that there had been no finding of his liability in assets.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife (a). Joint and separate judgment against husband and wife for debt.

(a) Under the general practice at Law, when a joint judgment has been recovered against the husband and wife, the creditor may Practice at Law under

joint
judgment.

proceed under his judgment against the husband's property, and the wife's separate estate; and, where an order for commitment has been obtained, the wife is not entitled to her discharge, except on proof that she has no separate estate. (*Ivens v. Butler*, and cases

Under separate
judgment
against wife.

cited p. 55). Where, however, judgment had been recovered against the wife solely, it was decided (before the date of the Debtors Act, 1869) that she was not entitled to be discharged, though it was shown that she had no separate property (*Heynon v. Jones*, and cases cited p. 55, *q. v.*). And a joint judgment was held to be gone at Law, though not in Equity, as against the wife, when the husband had obtained his discharge under the bankrupt laws (see the judgment of *Malins*, V.C., in *Chubb v. Stretch*, L. R. 9 Eq. 555; 18 W. R. 483; 39 L. J. Ch. 329; 22 L. T. N.S. 86).

Practice under
the 4th
section.

Can a judgment-creditor under this section proceed on his joint judgment against both the husband's assets and the wife's separate estate, and in addition have the benefit of the separate judgment against the wife, in the event of his remedy under the joint judg-

Construction of
the section
ambiguous.

ment proving unproductive or insufficient? The construction to be put upon the section is not free from doubt, and it may be contended that the intention is, that, as regards the husband's assets, the judgment shall be joint, and as to the residue a judgment against the wife binding her separate estate. The effect, however, of such a construction, if adopted, would be wholly to exonerate the separate estate, where the husband confesses, or is otherwise found liable for, the full amount of the debt or damages, even though nothing were ultimately recovered under the joint judgment. For "the residue," it is to be observed, is to be ascertained by deducting the amount for which the husband *is liable*, not that which may ultimately *be recovered* under the joint judgment.

"Residue"
how ascer-
tained.

In complex
cases remedy
in Chancery
Division.

Where the amount of assets is matter of account, or is for other reasons incapable of being ascertained by the machinery available in the "Common Law" Divisions, the creditor's remedy will probably be best found in the Chancery Division.

Assets for
which husband
liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows (b):

- (1.) The value of the personal estate in possession of the wife, which shall have vested in the husband :
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession :
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife :
- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received :
- (5.) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person :
- (6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors (c) :

Provided that when the husband after marriage pays any debt of his wife, or has a judgment *bonâ fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable (d).

(b) Notwithstanding the preamble, it appears, that "assets" Assets include

property coming to the wife after marriage.

under this section are not only "property which a woman has at the time of her marriage," and which then passes to her husband in his marital right, but include property vesting in him *jure mariti* after the marriage. The fact, that rents and profits are made assets by § 4 goes to show that the wider construction must be adopted. Indeed to hold otherwise would be to let in much of the mischief which the Amendment Act was intended to remedy. As to what property of the wife vests in the husband, see note (z), p. 39; and that the preamble cannot be held to control the enacting portion of an Act, see observations of Lord Cairns in *The Hammersmith Railway Company v. Brand*, L. R. 4 H. L. 217.

What are "assets," for which the husband is liable.

(c) The husband is liable to be charged with the value of the following classes of property, to which, when there is no separate use, he has an actual or inchoate title: the personal chattels and estate in possession of the wife (§ 1), her choses in action which he has, or with reasonable diligence might have, reduced into possession (§ 2); her chattels real (§ 3), which will, it is conceived, be limited to those interests to which the husband alone in his marital right can make a good title, and will not include those to the assignment of which the wife is a necessary party, e.g. her equitable terms of years (see *Dart's V. & P.*, 5th Ed. p. 9); the rents and profits of her real estate, which he has, or with reasonable diligence might have, received (§ 4); any interest which he takes in his wife's property under any ante-nuptial settlement or transfer, or which any other person holds as trustee for him, including, as it appears, any property which has been settled by his wife in fraud of his marital rights (§ 5); and any property which his wife with his consent has transferred to any person with the view of defeating her existing creditors (§ 6).

What debts the husband may set off against assets.

(d) Debts of the wife, for the payment of which the husband may claim credit, must mean debts for which the wife is liable, and will not include those which she contracts as agent of her husband. The provision as to judgments, which immediately follows, appears to indicate that such debts are debts contracted by her before marriage, and will therefore not include separate post-nuptial debts, for which the wife is liable in her separate estate. (*Johnson v. Gallagher*, p. 5, *supra*.)

It is to be noted that the husband may claim the benefit of this What judgment proviso, where judgment has been *recovered* merely, irrespective of ^{ments.} the question whether or not it has been satisfied.

As to the husband's power to prefer a particular creditor of his wife, see note (y) to sect. 2.

6. This Act shall not extend to Scotland.

Extent of Act.

7. This Act may be cited as the "Married Women's Short title. Property Act (1870) Amendment Act, 1874."



COURTS OF PROBATE AND DIVORCE.

(20 & 21 VICT. CAP. 85.)

An Act to amend the Law relating to Divorce and Matrimonial Causes in England. [28th August, 1857.]

§ 21. A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*: Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall within ten days after the making thereof be entered with the Registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband and any creditor or other person claiming under him to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof, provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific

property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

In case of a judicial separation, the wife to be considered a *feme sole* with respect to property she may acquire, &c.

§ 25. In every case of a judicial separation, the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

Also for purposes of contract and suing.

§ 26. In every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use: Provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

COURTS OF PROBATE AND DIVORCE AMENDMENT ACT.

(21 & 22 VICT. CAP. 108.)

An Act to amend the Twentieth and Twenty-first Victoria,
Chapter Eighty-five. [2nd August, 1858.]

§ 7. The provisions contained in this Act, and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

§ 8. In every case in which a wife shall under this Act or under the old Act of the twentieth and twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts or acts of the wife incurred, and entered into, or done between the times of the making such order or decree, and of the discharge, variation, or reversal thereof, and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree.

Order for protection of earnings, &c. of wife to be deemed valid.

FORM I.

1877—B—No. .

Claim to charge IN THE HIGH COURT OF JUSTICE.

the separate
estate of a sole
trader by
creditor hold-
ing her note of
hand.

CHANCERY DIVISION.

M.B. [or V.C.—]

Writ issued the of 1877

Between *A. B.* . . . *Plaintiff,*
and*C. D. and E. his wife. Defendants.*

STATEMENT OF CLAIM.

1. The defendant *E. D.*, at the date of the loan by the plaintiff hereinafter mentioned, was and she still is a married woman carrying on the trade of upholsterer separately from her husband, the defendant *C. D.*, within the meaning of the "Married Women's Property Act, 1870," s. 1.

2. On the of the defendant *E. D.* requested the plaintiff to lend her the sum of 200*l.* for the purposes of her said business, which the plaintiff consented to do, on having the repayment of the said sum of 200*l.* with interest thereon at the rate of 5*l.* per cent. per annum secured by the note of hand of the defendant *E. D.*

3. In pursuance of the said agreement, on the of the plaintiff advanced the said sum of 200*l.* to the defendant *E. D.*, and she thereupon gave to the plaintiff her note of hand for the said sum with interest at the rate aforesaid.

4. The interest on the said sum of 200*l.* being in arrear the plaintiff on the day of applied to the defendant *E. D.* for the repayment of the said principal sum and interest, but the defendant *E. D.* has hitherto omitted, and she in fact refuses, to pay the same or any part thereof.

5. The stock-in-trade, assets, and effects of the defendant *E. D.* in her said separate business are of very considerable value. The defendant *E. D.* is also entitled to certain real estate to her separate use in fee. The defendant *C. D.* is, as the plaintiff is advised, a proper party hereto.

6. The plaintiff advanced the said sum of 200*l.* to the defendant

E. D. on the faith and credit of her said separate estate, and under the circumstances aforesaid the said sum of 200*l.* and interest thereon at the rate aforesaid is payable to the plaintiff out of the said separate estate.

The plaintiff claims:—

1. That it may be declared that the separate estate of the defendant *E. D.* vested in her or in the defendant *C. D.* in right of the said *E. D.* is chargeable with the repayment to the plaintiff of the said sum of 200*l.* and interest at the rate of 5*l.* per cent. per annum.
2. That the defendant *C. D.* may be directed to receive the rents and profits of the said real estate, and to get in and collect and convert into money the assets and effects of the said separate business of the defendant *E. D.*, and thereout to pay to the plaintiff what on taking the aforesaid account shall be found due to him.
3. That if necessary a receiver may be appointed of the said rents and profits, assets and effects.
4. That the plaintiff's costs of this suit may be paid to him out of the separate estate of the said *E. D.*
5. That for the purposes aforesaid all necessary accounts may be taken, inquiries made, and directions given.
6. That the plaintiff may have such further or other relief as the nature of the case may require.

Delivered the of 18 by *X.* and *Y.* of &c., solicitors for the above-named plaintiff.

Note.—The husband must apparently be a party, as representing the legal title; and being in the position of a trustee will be entitled to his costs. These he will deduct from the separate property of his wife coming to his hands (*Picard v. Hine*, L. R. 5 Ch. 274), or they will be paid by the plaintiff, and repaid to the latter out of the separate estate, with his costs of suit. For form of judgment compare minutes in *Bullpin v. Clarke*, p. 78; *Picard v. Hine*, *ubi supra*; remarks of *Hall*, V.C., in *Davies v. Jenkins*, L. R. 6 C. D. 728; and as to married women defendants, see p. 50. It seems that a receiver will not be appointed before the hearing; see note (†), *ante*, p. 51.

Note.—When the wife is living separate from her husband, the presumption is that she is dealing in respect of separate estate, and the plaintiff need not in the first instance prove that the contract was entered into on the faith of that estate (*Johnson v. Gallagher*, *supra*, p. 8). See also as to form of judgment and generally, *Picard v. Hine*, L. R. 5 Ch. 274. It would appear, however, that the trustee is not strictly a necessary party: see *Davies v. Jenkins*, L. R. 6 C. D. 728. Where there is no trustee, the prayer will be for payment by the husband, as in Form I.

FORM III.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

M.R. [*or* V.C.—]

Claim for
administration
of separate
estate.

Writ issued the of 18 .
Between *A. B.* *Plaintiff*,
and
C. D. and *E. F.* . . . *Defendants.*

STATEMENT OF CLAIM.

1. *G. D.* of, &c., was, at the time of her death, indebted to the plaintiff in the sum of 50*l.* 12*s.*, for goods supplied to her by the plaintiff at her request, for the purposes of the business of upholsterer, carried on by her at, &c., separately from her husband, the defendant *C. D.* The said *G. D.* was also at the time of her death indebted to divers other persons in respect of her said business.

2. The said *G. D.* duly made her will, dated the of , 18 , and thereby devised and bequeathed all her real and personal property to the defendants *C. D.* and *E. F.*, their heirs, executors, administrators, and assigns, according to the nature and quality of the same respectively, upon trust for sale and conversion as therein mentioned, and by her said will the testatrix appointed the defendants executors thereof.

3. The said *G. D.* died on the of , 18 , without

having revoked or altered her said will, and the same was on the of duly proved by the defendants in the Principal Registry of the Probate Division of the High Court of Justice.

4. The testatrix was at the time of her death entitled for her separate use to considerable real and personal estate, in addition to her said separate business and the capital, stock-in-trade, assets, and effects thereof.

5. The defendants, though repeatedly requested so to do, have not paid the debt so due to the plaintiff as aforesaid, and the same is now due and owing.

The plaintiff claims:—

1. That an account may be taken of what is due to the plaintiff and all other the creditors of the separate estate of the said *G. D.*
2. That the amount which shall be so found due may be paid out of the said separate estate, as well real as personal, in a due course of administration by and under the direction of this Honourable Court.
3. (*Necessary accounts and inquiries.*)
4. (*General relief.*)

} See p. 73.

Delivered, &c.

Note.—For Minutes of Order, see Form VI.

FORM IV.

Claim by married woman to restrain an infringement of copyright. IN THE HIGH COURT OF JUSTICE.
CHANCERY DIVISION.
M.R. [*or V.C.*—]

Writ issued the of 18 .
Between *A. B.* . . . Plaintiff,
and
C. D. . . . Defendant.

STATEMENT OF CLAIM.

1. The plaintiff (who is a married woman) is a professor and composer of music, and as such carries on an employment separately from her husband.

2. In the early part of the year 1872 the plaintiff composed an operetta, and wrote the libretto thereof, and subsequently published the said operetta under the title of . The said operetta was on the day of , 1872, duly registered by the plaintiff under the provisions of the Copyright Act (5 & 6 Vict. c. 45, s. 20), and the plaintiff thereupon became and still is the sole owner of the copyright in the said operetta as separate property within the meaning of the Married Women's Property Act, 1870.

3. The said operetta has obtained great popularity, and the copyright version thereof commands a wide sale, and large profits have been realised by the plaintiff by the sale thereof.

4. The plaintiff has recently discovered that the defendant is publishing and selling a pirated version of the said operetta differing only colourably from the plaintiff's said copyright edition.

5. The plaintiff's separate property in the said copyright will be irreparably injured unless the defendant be restrained by the order and injunction of this Honourable Court from selling the said pirated version of the said operetta.

6. The plaintiff has already suffered considerable pecuniary loss and damage by the wrongful acts of the defendant.

The plaintiff claims :—

1. That the defendant, his servants and agents, may be restrained, by the order and injunction of this Honourable Court, from publishing, selling, or offering for sale the said version so published by him as aforesaid of the said operetta, or any version of the said operetta other than that published by the plaintiff.
2. That damages may be paid to the plaintiff by the defendant for his wrongful acts in the premises.
3. That the defendant may pay the costs of this action.
4. (*Accounts and inquiries.*)
5. (*General relief.*)

} See p. 73.

Delivered, &c.

Note.—This bill is filed under the 11th section, under which the wife has the same remedies for the protection of her separate property as a *feme sole*. Her husband is therefore not made a party, and she sues without a next friend: see p. 50.

FORM V.

Judgment for
payment of
debt secured
by note of
hand out of
separate estate.

Let the defendants *P.* and *L.* (trustees) receive the rents and profits of the several estates comprised in the indenture of settlement in the pleadings mentioned dated, &c.; and Let an account be taken of what is due to the plaintiff for principal and interest on note of the hand of the defendant in the bill mentioned, dated &c.; and Let the costs of the plaintiff and of the said defendants *P.* and *L.* of this suit (cause) up to this time be taxed, &c.; and Let the said defendants *P.* and *L.* within &c. pay to the plaintiff what shall be certified to be due to him in respect of such principal interests and costs out of the rents and profits hereinbefore directed to be received by them, and be at liberty thereout also to retain the amount of their said costs when taxed; and Let the said defendants account annually before (the judge) for the rents and profits of the estates comprised in the said indenture of settlement which they shall so receive; and within &c. pay over to the plaintiff the balances which shall from time to time be certified to be due from them in passing such accounts until such principal, interest, and costs as aforesaid, and also any subsequent interest or any part of such principal which shall from time to time remain unpaid, shall be fully paid and satisfied. Adjourn further consideration &c. (*Bullpin v. Clarke*, 17 Ves. 365; Seton, 678.)

FORM VI.

Order for
administration
of separate real
and personal
estate.

- Let the following accounts and inquiries be taken and made:—
1. An account of what is due to the plaintiff and all other the creditors of *A.* deceased, the testatrix in the bill named.
 2. An account of the testatrix's funeral expenses.
 3. An account of the personal estate of the testatrix which passed by her will come to the hands of the defendants *B.* and *C.*, her executors or either of them, or to the hands of any other persons or person by the order or for the use of the said defendants or either of them.

4. An inquiry what parts, if any, of the testatrix's personal estate are outstanding or undisposed of.

And Let the testatrix's personal estate be applied in payment of her debts and funeral expenses in a course of administration *pari passu*.

And in case the testatrix's personal estate shall be insufficient for the payment of her debts and funeral expenses, Let the following further inquiries and account be made and taken.

5. An inquiry what real estates have passed under the will of the testatrix.

6. An account of the rents and profits of the testatrix's real estates received by the said defendants or either of them, &c.

(*Inquiries as to incumbrances, and directions for sale, see Seton, p. 251.*)

Adjourn, &c. (*Owens v. Dickenson, Cr. & Ph. 48; Seton, p. 233.*)

FORM VII.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

M.R. [*or V.C.—*]

Between *A. B.* *Plaintiff,*

and

C. D. *Defendant.*

And in the matter of the "Married Women's Property Act, 1870, s. 3.

1870."

To Her Majesty's High Court of Justice.

The humble petition of *E. F.*, the wife of *G. F.*, of [*address and description*], by *H. K.* her next friend

Showeth as follows:—

1. [*State institution of action, as for administration of the estate of X. an intestate, and subsequent proceedings, and date of petitioner's marriage.*]

2. Your petitioner, as one of the three next of kin of the said

Petition for the transfer of Consols into the name of a married woman under the Married Women's Property Act, 1870, s. 3.

intestate, is entitled to one equal third share in his personal estate, which said share is now represented by the sum of 1000*l.* Consolidated 3*l.* per Cent. Bank Annuities, and the sum of 35*l.* cash standing to the credit of the above-mentioned suit, the account of *E. F.*, the wife of *G. F.*

3. Your petitioner is desirous that the said sum of 1000*l.* Consolidated 3*l.* per Cent. Bank Annuities may be transferred into her name as a married woman entitled thereto to her separate use, under the provisions of the "Married Women's Property Act, 1870."

Your petitioner therefore humbly prays

That the sum of 1000*l.* Consolidated 3*l.* per. Cent Bank Annuities standing to the credit of the above-mentioned action, the account of *E. F.*, the wife of *G. F.*, may be transferred into the name of your petitioner *E. F.*, the wife of *G. F.*, as a married woman entitled thereto to her separate use; and that the sum of 35*l.* cash standing to the like credit and account, and any interest to accrue on the said Bank Annuities previous to such transfer, may be paid to the said *E. F.* on her separate receipt.

That such further or other order may be made in the premises as to this Honourable Court shall seem meet.

And your petitioner will ever pray, &c.

Note.—It is intended to serve this petition on the said *G. F.*

Note.—This application may also be made on summons, Dan. Ch. Forms, 1914. See also *Re Bartholomew's Trust*, and note (j), p. 32. The petitioner appears by a next friend in order to avoid questions as to security for costs: see p. 50.

FORM VIII.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

M.R. [or V.C.—]

Petition by a
deserted wife
to have a
legacy in Court
paid to her as
a *feme sole*.

In the matter of the trusts of a sum of 500*l.* bequeathed
by the will of *A. B.* in favour of *C. D.*

and

In the matter of the Act 10th and 11th Victoria,
chapter 96, intituled "An Act for better securing
trust funds, and for the relief of trustees."

To Her Majesty's High Court of Justice.

The humble petition of the above-named *C. D.* of &c., a married
woman, by *X.* of &c., her next friend,

Showeth as follows:—

1. [*State will of A. B., bequeathing 500*l.* free of duty to the petitioner.*]

2. [*State death of testator, probate of his will, and payment by his executors of all debts and legacies other than said legacy.*]

3. [*State marriage of petitioner with E. D.*]

4, 5. [*State affidavit on which the trustees paid the money into Court, and the payment in.*]

6. On the of 18 your petitioner was abandoned by her.
husband the said *E. D.* [*State the circumstances and show that the
desertion continues.*]

7. There are three children of the said marriage, viz., *F. D.*, *G. D.*,
and *H. D.*, born respectively &c. The said *E. D.* left his wife your
petitioner wholly destitute, save to the trifling extent hereinafter
mentioned. Since the said of 18 (*day of desertion*), he has
never contributed in any way whatever to the support of your
petitioner and her children.

8. No settlement or agreement for a settlement was made or
entered into before or upon, or has been made or entered into since,
the said marriage other than a settlement dated &c. [*State same,
showing that it contained a power to the trustees to advance the trust
funds to the husband on his personal security.*]

9. The whole of the said sum in settlement was advanced by the trustees thereof to the said *E. D.*, in accordance with the provision in that behalf in the said indenture of settlement contained. The said *E. D.* has never repaid to the trustees any part of the sum so advanced to him.

10. On the of 18 , the said *E. D.* was duly adjudicated bankrupt. His estate has paid a dividend of 4s. 6d. in the pound, and a further dividend of 2s. 3d. is anticipated. The trustees of your petitioner's said marriage settlement have proved in the said bankruptcy, and they accordingly expect to receive the sum of £. in the whole in respect of the trust funds comprised in such settlement. This is the sole provision for the maintenance of your petitioner and her children.

11. Under the circumstances aforesaid your petitioner submits that the said sum of 500£. should be paid to her as if she were unmarried.

12. No duty is payable on the said sum of 500£.

13. [*Name place for service.*]

Your petitioner therefore humbly prays:--

1. That the costs of your petitioner and all other persons properly appearing on this petition may be taxed.
2. That out of the said sum of 500£. the said costs when taxed may be paid, and that the residue of the said sum may be paid to your petitioner as a *feme sole*.
3. That such further or other order may be made in the premises as to this Honourable Court shall seem meet.

And your petitioner will ever pray, &c.

Note.—This petition would be served on the trustees of the will of *A. B.*, and on the husband's trustee in bankruptcy. As to the jurisdiction, see *ante*, p. 17.

FORM IX.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

M.R. [*or* V.C. —]

In the matter of *A. B.*, a married women,
and

In the matter of the “Married Women’s Property
Act, 1870.”

Notice of
motion under
the Married
Women’s Prop-
erty Act,
1870, s. 9, as
to ownership

Take notice that this Honourable Court will be moved before His Lordship [*name of Judge*] on the day of by &c., on the part of the above-named *A. B.*, the wife of *C. B.*, of [*address and description*], that it may be declared [*state nature of question, as*] that the said *A. B.* is entitled to the stock-in-trade, assets, and effects of and relating to the business of , carried on by her at aforesaid, for her separate use, within the meaning of the above-mentioned Act, and that for that purpose all necessary inquiries may be made and directions given.

Dated, &c.

To the above-named *C. B.*

Note.—This form is in the nature of an originating motion. If it is made in an action, it must be intituled accordingly. See Dan. Ch. Forms, 2224.

FORM X.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

M.R. [*or* V.C. —]

In the matter of a policy effected on the life of *A. B.*
and

In the matter of the “Married Women’s Property
Act, 1870.”

Petition for the
appointment of
a trustee of a
policy effected
to the separate
use of a married
woman and her
children [and
for a declara-
tion of trusts].

To Her Majesty’s High Court of Justice.

The humble petition of *C. B.*, the wife of the above named *A. B.*, of [*address and description*], by *X. Y.*, of [*address and description*], her next friend, and of *D. B.* and *E. B.*, respectively infants, by the said *X. Y.*, their next friend,

Showeth as follows:—

1. On the of the said *A. B.*, in contemplation of his marriage with your petitioner *C. B.*, effected a policy on his life, numbered in the Insurance Company, for securing the sum of 1000*l.* to the separate use of your petitioner *C. B.*, during her life, and after her decease for the children of the said marriage, as appears upon the face of the said policy; but the interests to be taken by your petitioners respectively are not further or otherwise expressed.

2. The said marriage was duly solemnised on the of , and there has been issue of the said marriage two children and no more, namely, your infant petitioners.

3. The said *A. B.* is in failing health, and it is expedient that a trustee of the said policy should be appointed under the provisions of the 10th section of the "Married Women's Property Act, 1870," [Or, the said *A. B.* died on the of , and the moneys secured by the said policy are now payable.] Your petitioners are desirous that *M. N.* should be appointed trustee of the said policy. The said *M. N.* is a fit and proper person to be appointed such trustee.

4. Your petitioners are further desirous that their respective rights and interests in the said policy moneys may be declared by this Honourable Court.

Your petitioners therefore humbly pray:—

1. That the said *M. N.* may be appointed trustee of the said policy, numbered —, on the life of the said *A. B.*
2. That the respective rights and interests of your petitioners in the moneys secured by the said policy may be declared.
3. That such further or other order may be made in the premises as to this Honourable Court shall seem meet.

And your petitioners will ever pray, &c.

It is intended to serve this petition on, &c.

Note.—A trustee appointed under the 10th section has a power of giving a good discharge to the office (*vide* sect. 10). He will be enabled to invest the money, when received, in the forms of investment, and with the powers, given to trustees by statute. See Davidson's *Precedents in Conveyancing*, 3rd Ed., vol. iii. p. 26. As to the trusts being declared by the Court, see *In re Mellor's Policy Trusts*, cited p. 46. The woman petitions by a next friend, to avoid difficulties as to the effect of the 11th section, see p. 50.

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that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV, his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay in his note to page 763:—"In the United States no ship is bound to take on board a pilot either going in or coming out of the harbour, but if a pilot offers and is ready, the ship must pay pilotage fees whether he is taken on board or not." Ships do not exist for pilots, but pilots for ships, so that this option in the use of the pilot, and obligation in the matter of fees, appears to us to be exactly that solution of the difficulty which should not have been arrived at; and, moreover, it is open to the first objection urged by Mr. Kay against the compulsory system of pilotage, which is, that it obliges many ships which do not require pilots to pay for keeping up a staff for those who do. Seven other cogent reasons, for which we must refer the reader to the book itself, though most of them, indeed, will instantly present themselves to the minds of sailors without even an effort of memory, are noted. Section 338 of the Merchant Shipping Act provides that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is compulsory by law. If he interferes to correct the pilot in the handling of a ship, with the peculiarities of which the latter cannot generally be acquainted, he may render himself and the owners liable in case of accident, and so a premium is offered to his indifference, proof being always required that the damage was occasioned solely by the pilot's neglect or fault, to entitle the owners to the benefit of this section. The decision in the case

of the *General de Caen* well illustrates some of the difficulties surrounding the subject. She was a French ship upon the Thames, where the employment of a pilot is compulsory, and she, therefore, took on board a pilot as well as a waterman to take the wheel in consequence of none of the crew being able to understand English. The waterman put her helm up instead of luffing as the pilot ordered, whereby a barge was run into and damaged. The French owner claimed under Section 389 of 17 and 18 Vic., c. 104. It was held that the pilot was not answerable for the waterman's incapacity or fault; that the pilot gave the proper orders; that it would be contrary to justice to say that the pilot was solely liable for the collision; that the waterman was the servant of the owners, and that they, therefore, were liable. The real question at issue seems to have been whether the English pilot ought to have spoken French or the French ship to have had on board a helmsman who could understand English, and the corollary, when the decision had been given in favour of the former, that the Government officer, when engaging the helmsman, was acting merely as the agent of the French owners.

"The master has a large authority over the passengers on board his ship, equal in cases of great emergency to that which he possesses over the crew. Lord Ellenborough has decided—it will comfort intending travellers by sea to hear, especially if this country should again become involved in a war with a nation which, unlike Ashanti and Abyssinia, possesses a navy—that a master exceeded the limits of his authority in placing a passenger who refused to fight on the poop, though willing to do so elsewhere, in irons all night on that particular part of the ship to which he had objected.

"It is for the interest and security of commerce and navigation that it should be generally known that the amount of service rendered is not the only or proper test by which the amount of salvage reward is estimated, but the Court will grant to successful salvage an amount which much exceeds a mere remuneration for work and labour in order that the salvors should be encouraged to run the risk of such enterprises and go promptly to the succour of lives or vessels in distress, though they must take care that they do not by their subsequent conduct forfeit their claims to such reward.

"That it should be necessary to entice men by money to save the lives of their fellow-creatures is not a matter for congratulation; still it was no doubt to some extent anomalous that formerly, whilst large proportionate sums were paid for the recovery of property, for the rescuing of human life unless associated with property, no salvage reward could be recovered. But by Section 458 of the Merchant Shipping Act the preservation of human life is made a distinct ground of salvage reward, with priority over all other claims for salvage where the property is insufficient, and if the value of the property is not adequate to the payment of the claim for life-salvage alone, the Board of Trade is empowered to award to the salvors such sum as it deems fit, either in part or whole satisfaction.

"There is, perhaps, no species of service liable to

THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

REVIEWS OF THE WORK—*continued.*

a greater variety of circumstances under which it can be performed than salvage. Consequently we cannot be surprised that questions of this kind frequently come before the Courts, and that the number of decided cases is very large; but Mr. Kay has succeeded in an admirable way in extracting the main points connected with each case, and in presenting them in as few words as possible. Of course fuller information may sometimes be required, but the reader will then know where to find it.

"In conclusion, we can heartily congratulate

Mr. Kay upon his success. His work everywhere bears traces of a solicitude to avoid anything like an obtrusive display of his own powers at the expense of the solid matter pertaining to the subject, whilst those observations which he permits himself to make are always of importance and to the point; and in face of the legislation which must soon take place, whether beneficially or otherwise, we think his book, looking at it in other than a professional light, could scarcely have made its appearance at a more opportune moment."

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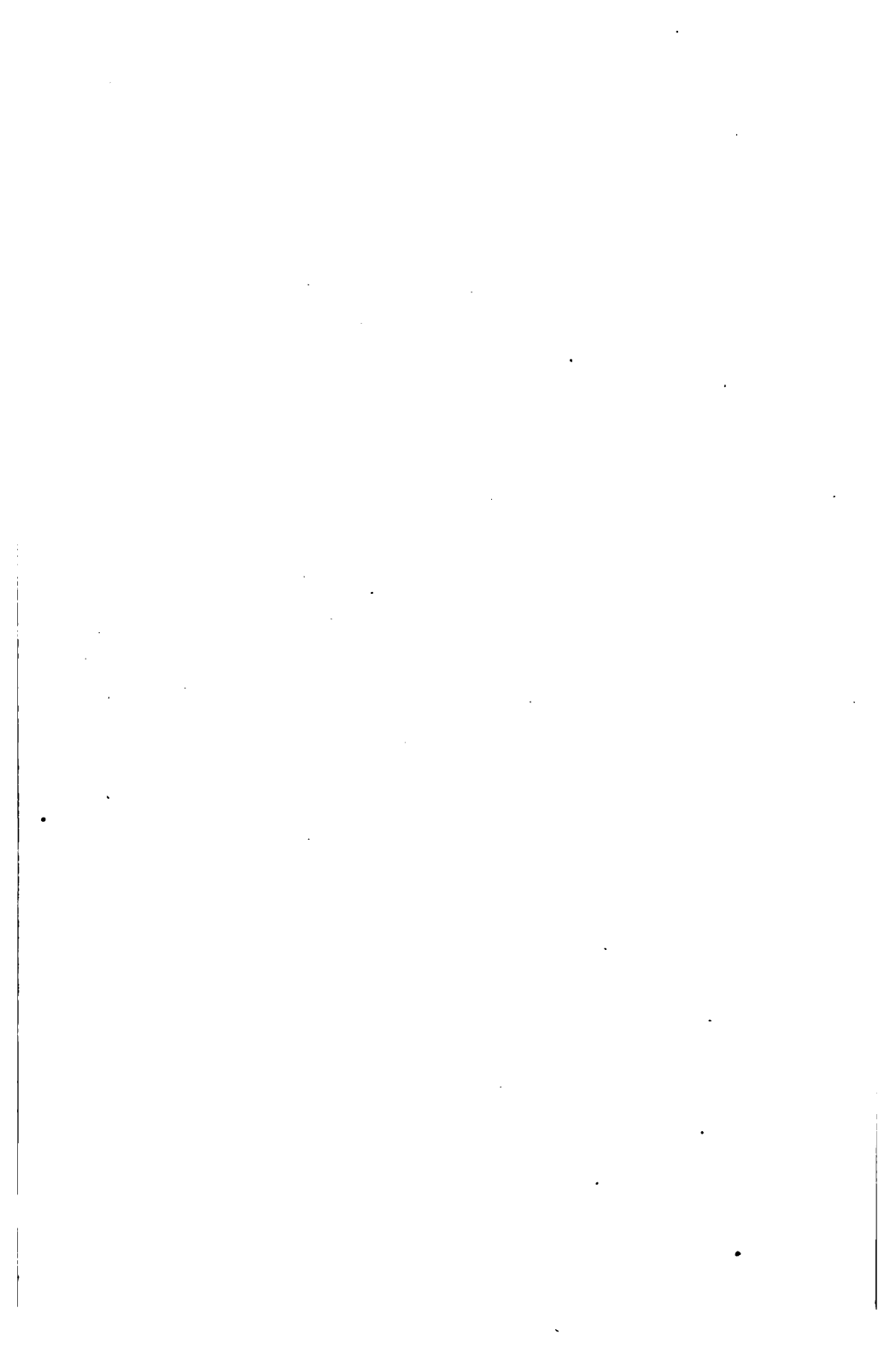
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